Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

AMERICAN AIRLINES, INC.,

Petitioner,

v.

ROBERT H. TICE, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Whether, under the doctrine of adequate representation, a doctrine this Court has recognized, issue or claim preclusion is appropriate when:

A. the same defendant is subjected to successive suits, involving identical factual circumstances and legal arguments, brought by members of the same organization (such as a union whose members are covered by the same collective bargaining agreement) on an issue common to all; and/or

B. after the Government entity that is charged with enforcing a law establishing private rights litigates an issue to final judgment, private litigants protected by that Statute seek to relitigate the same issue.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner: American Airlines, Inc., a wholly-owned subsidiary of AMR Corporation.

Respondents:

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American Airlines, Inc. ("American" or "Petitioner") respectfully petitions this Court for a Writ of Certiorari to review the judgment of the Court of Appeals in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit was rendered on December 17, 1998 and is reported at 162 F.3d 966 (7th Cir. 1998). A copy of the opinion is reprinted in the Pet. App.1a-18a. The district court's opinion is reported at 959 F. Supp. 928 (N.D. Ill. 1997) and is reprinted at Pet. App. 19a-37a.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on December 17, 1998. American filed a Petition for Rehearing with Suggestion for Rehearing *en banc* on December 31, 1998, and the petition for rehearing was denied on January 26, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved in this case is the Due Process Clause of the Fifth Amendment to the United States Constitution, which provides in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

A. Factual Background

Certain aircraft operated by American Airlines, Inc. ("American") have three cockpit seats: (1) for the captain in command of the aircraft; (2) for the first officer or "co-pilot"; and (3) for a flight engineer or flight officer. The captain and first officer pilot the aircraft; the flight officer monitors the aircraft's fuel, electrical, hydraulic and other systems. For thirty-five years, as part of its safety policy, American has used the flight officer seat to train future pilots. It hires licensed pilots for that position and requires them to progress, through training and seniority bidding under their collective bargaining agreement, from flight officer to first officer to captain. No one is hired for the position of flight officer who cannot progress to captain and serve for a reasonable period of time before reaching 60, the mandatory retirement age for pilots imposed by the Federal Aviation Administration ("FAA").[1] In the case below, several retired captains challenged American's training policy as a violation of the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.* ("ADEA") because it prevented them from using their seniority to "bid-down" to the flight officer seat for which there is no requirement that the occupant retire at age 60.

American has successfully defended its policy against the very same ADEA challenge in prior litigation. Both the Fifth and the District of Columbia Circuits have affirmed district court decisions upholding American's refusal to hire and/or to allow captains to "bid down" to the training seat as

1. *See* 14 C.F.R. § 121.383(c).

a *bona fide* occupational qualification, and therefore expressly permitted under the ADEA.[2] In *Murnane, Secretary of Labor v. American Airlines*, 482 F. Supp. 135 (D.D.C. 1979), *aff'd*, 667 F.2d 98 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 915 (1982), the 43 year-old plaintiff had been rejected for the training seat as a new hire because there was no actuarial possibility that he could successfully progress to the captain's seat and serve there, given the size of the airline at the time and the FAA's age-60 rule. The Department of Labor intervened as a plaintiff,[3] supporting Murnane's claim that American's policy of reserving the third seat for training future captains violated the ADEA. The district court ruled for American, finding that American's training-seat policy was reasonably necessary to the safety of its operations in light of the extraordinary standard of care imposed on air carriers. *Murnane*, 482 F. Supp. at 146. The court held that American's policy was a *bona fide* occupational qualification and, therefore, did not violate the ADEA. *Id.* at 145-48. The District of Columbia Circuit affirmed, expressly recognizing the "great leeway and discretion" afforded the industry in determining the safest manner in which to serve the flying public. *Murnane*, 667 F.2d at 99. This Court declined review.

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2. The same challenge has been brought in three other unreported cases without any decision on the merits. Two were dismissed voluntarily: a claim by the EEOC brought in the District Court for the Southern District of California and a claim by several captains brought in the Middle District of Florida. The third, in the Northern District of Texas is described in full at p. 24 n.9.

3. At that time, the Secretary of Labor held the enforcement role now assigned to the Equal Employment Opportunity Commission ("EEOC"). The EEOC assumed the Secretary's job as the government agency for enforcing the ADEA in 1979, pursuant to Reorganization Plan No. 1 of 1978, § 2, 43 Fed. Reg. 19807 (1970). *See* 29 U.S.C. § 625.

After *Murnane* was decided, 22 retiring American pilots, acting for themselves and "others similarly situated," and represented by the same counsel as the *Tice* plaintiffs here, commenced another challenge to American's training-seat policy in *Johnson et al. v. American Airlines, Inc.*, 745 F.2d 988 (5th Cir. 1984), *cert. denied*, 472 U.S. 1027 (1985). The *Johnson* plaintiffs challenged the same policy at issue in *Murnane*, on the same legal grounds, but from a different factual perspective. The *Johnson* plaintiffs challenged American's refusal to allow pilots who had reached the FAA's mandatory retirement age to exercise their seniority under the collective bargaining agreement between American and the Allied Pilots Association acting on their behalf to "bid down" to the flight officer seat.[4] The jury, and court, found American's practice of reserving the third seat for future captains to be a *bona fide* occupational qualification. The Fifth Circuit affirmed, and again, this Court declined review.

Then, *again*, in 1993, the EEOC brought a lawsuit on behalf of pilots who applied for, but were denied, initial employment as flight officers, seeking to enjoin American's training-seat policy on the ground that it violated the ADEA. *EEOC v. American Airlines*, 835 F. Supp. 911 (N.D. Tex. 1993), *aff'd*, 48 F.3d 164 (5th Cir. 1995). The district court found that collateral estoppel precluded relitigation of the same issue that had been litigated in *Murnane* and decided

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4. The collective bargaining agreement sets forth, among other things, the rules that govern seniority and bidding for available positions. Whether that agreement allows pilots a contractual right to bid down to the flight officer seat is a matter of interpretation that would be governed by the "minor dispute" resolution procedures mandated by the Railway Labor Act, 45 U.S.C. § 184. *See Consolidated Rail Corp. v. Railway Labor Executives Ass'n*, 491 U.S. 299 (1989).

against the EEOC, dismissing the action. *See EEOC*, 48 F.3d at 165. The Fifth Circuit affirmed, holding that *Murnane* barred a new generation of attacks on American's training-seat policy because *Murnane* had established that the policy was a *bona fide* occupational qualification. *Id.* at 169 n.6. In all three cases, plaintiffs sought to enjoin American's continued use of the policy as a violation of the same ADEA provisions.

Eight months after the Fifth Circuit's decision in *EEOC*, the same attorney who had represented the *Johnson* private plaintiffs (supported on appeal to the Seventh Circuit by the same EEOC counsel who appeared in the agency's Fifth Circuit case) brought the action below. And, *again*, the plaintiffs here challenge the same policy on the same legal grounds. They reassert the identical claims asserted by the *Johnson* plaintiffs, that American is required by the ADEA to permit them to "bid down" to the flight officer seat. Plaintiffs below also sue not only for themselves but also on behalf of "all others similarly situated," as had the *Johnson* plaintiffs. The seniority on which they rely to acquire such positions by the bidding process is the same seniority asserted and relied on by the plaintiffs in *Johnson* and by any other pilot: the seniority prescribed under the collective bargaining agreement to which they are all parties through their union, the Allied Pilots Association.

B. Proceedings Below

American sought to dismiss the *Tice* complaint because the plaintiffs' contention that its training-seat policy violated the ADEA had been litigated and decided by each of these prior adjudications in American's favor and against their Allied Pilots Association predecessors, as well as against the

government agencies charged with enforcing the ADEA on behalf of individuals and as public attorney general. American argued both that the *Tice* plaintiffs' claims were barred because they were precluded by the decision in *Johnson*, and that the plaintiffs were collaterally estopped from relitigating whether American's training-seat policy was a *bona fide* occupational qualification because that same issue had been litigated and decided against the Department of Labor and the EEOC suing on behalf of applicants. The court granted American's motion for judgment on the pleadings on *res judicata* grounds, finding that the claims and interests of the *Tice* plaintiffs were identical to those previously litigated in *Johnson* and therefore, the earlier *Johnson* plaintiffs had "virtually represented" the current plaintiffs when Johnson and the other pilots sued American on the same claim, and on behalf of those similarly situated. Pet. App. 36a. Plaintiffs appealed.

On appeal, the Seventh Circuit rejected American's argument that the representative status of the *Johnson* plaintiffs, as well as the issue-preclusive effect of the government's litigation in *Murnane* and *EEOC*, justified the district court's dismissal of this action, and reversed. The court held that the *Johnson* plaintiffs could have adequately represented the *Tice* plaintiffs *only* if there had been a certified class under Fed. R. Civ. P. 23 or formal privity between the *Tice* plaintiffs and the *Johnson* plaintiffs at the time of the *Johnson* suit.

> Unless there is a properly certified class action, handled with the procedural safeguards both state and federal rules afford, normal privity analysis must govern whether nonparties to an earlier case can be bound to the result.

Pet. App. 13a. The court further rejected American's argument that the doctrine of collateral estoppel precluded relitigation of the *bona fide* occupational qualification issue where it had previously been raised, and lost, by the agency statutorily authorized to enforce the ADEA as public "attorney general." *See* 29 U.S.C. § 626(c)(1). American's motion for rehearing *en banc* was denied on January 26, 1999. Pet. App. 43a-44a.

REASONS FOR GRANTING THE WRIT

This case presents the Court with an issue of great importance to the consistency and finality of adjudication in the federal courts. In the words of the Seventh Circuit's opinion below, it is an issue that:

> . . . stands at the intersection of two important principles of civil litigation: the right, grounded both in due process and in the property right represented by the lawsuit *chose in action*, of each individual to assert her own claims; and the need of litigants and the judicial system alike for finality of decision after a full and fair airing of a matter.

Pet. App. 8a. As this Court has repeatedly acknowledged, preclusion law is subject to decisional evolution, not for the purpose of maintaining or developing formal rules, but as a "measure of the fairness of the rules of *res judicata*." *See Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 325 (1971). The underpinning of the concept of *res judicata* is the "prevention of harassment of some litigants by the repeated assertion of the same or different claims against them by others . . . ." *Id.* at 328 n.18.

Guiding the trial courts of the United States, this Court has fashioned the federal preclusion rules to strike a balance between the competing interests of judicial economy and finality of judgments, and the due process rights of litigants. *Blonder-Tongue*, 402 U.S. at 328-29. In doing so, the Court has also repeatedly acknowledged that nonparties to earlier litigation may constitutionally be bound by the results if their interests are sufficiently represented in that earlier litigation. *Hansberry v. Lee*, 311 U.S. 32, 42-43 (1940) (acknowledging "that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present"); *see also Martin v. Wilks et al.*, 490 U.S. 755, 762 n.2 (1989) (same); *Richards et al. v. Jefferson County Alabama et al.*, 517 U.S. 793, 798 (1996) (recognizing "an exception to the general rule when . . . a person . . . has his interests adequately represented by someone with the same interests who is a party").

Although this Court has considered related issues in the recent past, it has left open the question of what circumstances constitute "adequate representation" so as to justify preclusion against nonparties to earlier litigation. The lower federal courts have grappled with this question, reaching different and conflicting conclusions. This question of federal preclusion law is an important one that affects an increasing number and variety of cases as the nation's economy emerges onto a global stage. More and more companies can be sued in every one of the 94 federal district courts on the same claim — imposing the costs of litigation, including extensive discovery, over and over again — even though the suits raise the same legal issues in identical factual circumstances. This Court should grant *certiorari* to resolve the conflicts among the circuits because the question affects this substantial and

growing number of cases throughout the country. Because state preclusion law must also comport with constitutional due process, this Court's guidance as to the scope of the privity exception for purposes of preclusion would provide, in addition, significant help to state courts applying state law.

I.

THIS COURT'S REVIEW IS NEEDED TO RESOLVE AN IMPORTANT CONFLICT AS TO THE SCOPE OF THE PRIVITY EXCEPTION WITH RESPECT TO CLAIM AND ISSUE PRECLUSION.

Since at least 1975, the lower federal courts have expressly recognized the principle that a party not directly involved in prior litigation, but whose interests were "virtually represented" in that litigation, may be bound by its results. *See, e.g., Aerojet-General Corp. v. Askew*, 511 F.2d 710 (5th Cir.), *cert. denied*, 423 U.S. 908 (1975). But, as the Eighth Circuit recognized in *Tyus v. Schoemehl*,

> although this principle is generally accepted, courts are *sharply divided* on how to implement this strand of issue preclusion.

93 F.3d 449, 454 (8th Cir. 1996), *cert. denied sub nom, Miller v. Schoemehl*, 520 U.S. 1166 (1997) (emphasis added). A comparision of *Tyus* with the Seventh Circuit's decision below exposes clearly this "sharp division" among the courts of the United States over claim and issue preclusion, its scope and limitations. The conflict is between those courts that would give preclusion "wider application" to preclude repetitive and harassing litigation, and those, like the court below, that find preclusion appropriate *only* where there is

formal privity or identity of parties between cases. *Id.* at 454-55. This Court has acknowledged the modern expansion of the concept of "privity" in current usage as describing "various relationships between litigants that would not have come within the traditional definition of the term." *Richards*, 517 U.S. at 798; *see Tyus*, 93 F.3d at 455. But the extent to which the courts may employ this expanded concept to prevent harassing and repetitive litigation over identical issues is in sharp dispute, as is illustrated by the difference between the Eighth Circuit's approach in *Tyus* and that of the Seventh Circuit below.

A. The Circuits Disagree Whether Preclusion Is Appropriate Absent Class Certification or Formal Privity.

The Seventh Circuit took a highly restrictive view of privity and virtual representation. It made clear its disdain for virtual representation or expanded notions of modern privity, referring to virtual representation as only a "catchy phrase" and a "heuristic." Pet App. 7a, 10a. In the Seventh Circuit's view, relitigation is not only permitted, but required, whenever the second party was not actually involved in some way in the first litigation (for example, as a member of a certified class), and where the second party does not stand in the first party's shoes either by contract or by law. Certain other circuits have taken a similarly restrictive view. The First Circuit has held that virtual representation will not serve to bar a nonparty's claim unless the nonparty has had actual or constructive notice of the earlier litigation. *Gonzalez v. Banco Central Corp.*, 27 F.3d 751, 761 (1st Cir. 1994). The Sixth Circuit's jurisprudence is less clear, but appears to adopt the restrictive view of virtual representation. *See Bittinger v. Tecumseh Progs Co.*, 123 F.3d 877 (6th Cir. 1997), *reh'g en*

banc denied (Oct. 21, 1997); *but see Becherer v. Merrill Lynch Pierce & Smith, Inc.*, 131 F.3d 580 (6th Cir. 1997), *vacated, reh'g en banc granted*, 1998 U.S. App. LEXIS 2051 (6th Cir. 1998). *See also Collins et al. v. Dupont de Nemours and Co.*, 34 F.3d 172, 177 (3rd Cir. 1994) (interpreting New Jersey law to confine preclusion to cases where the parties in the earlier litigation and those sought to be precluded had a "pre-existing legal relationship").

In sharp contrast with the Seventh Circuit's approach, the Eighth Circuit in *Tyus* recognized that privity today, for purposes of preclusion, means more than formal privity. 93 F.3d at 455. Thus, the court focused its attention on whether the interests of the plaintiffs in *Tyus* were sufficiently represented in the first lawsuit, such that the second plaintiffs should be bound by the earlier decision. *Id.* at 454. In that case, the initial plaintiffs were members of the St. Louis Board of Aldermen who sued the City of St. Louis challenging certain election boundaries under the Voting Rights Act of 1965, 42 U.S.C. § 1973, claiming the boundaries diluted minority participation in voting districts to the detriment of "black voting strength." 93 F.3d at 453. While the City's motion for summary judgment was pending, some of the initial plaintiffs attempted to withdraw from the case and filed a second lawsuit *with new co-plaintiffs* raising the identical claim. The district court hearing the first lawsuit granted summary judgment for the City. The court hearing the second lawsuit then dismissed that action as *res judicata*. *Id.* at 452. On appeal, the Eighth Circuit analyzed the question under an "issue preclusion theory," which it defined as referring "to the effect of a judgment in foreclosing relitigation of a matter that has been litigated and decided." *Id.* at 453.

The Eighth Circuit affirmed the lower court's finding of preclusion on three grounds. First, the court found that even

the new plaintiffs had a sufficient relationship to the earlier plaintiffs to satisfy the requirements for preclusion because of their co-plaintiff relationship with parties to the initial suit. *Id.* at 457. Second, the court found that the evidence of tactical maneuvering also counseled in favor of preclusion. *Id.* Third, the court recognized that the two sets of plaintiffs had identical interests in pursuing identical claims, recognizing that: "One party 'adequately represents' the interests of another when the interests of the two parties are very closely aligned and the first party had a *strong incentive* to protect the interest of the second party." *Id.* at 455-56 (emphasis added).

Significantly, the Eighth Circuit recognized that a different decision would have permitted "various members of a coordinated group to bring separate lawsuits in the hope that one member of the group would eventually be successful, benefiting the entire group." *Id.* at 457. Thus, it found that if it had "held preclusion inapplicable, this case could assume immortality," which would entail "a significant cost to the judicial system" and discourage "the principles and polic[i]es the doctrine of *res judicata* was designed to promote." *Id.* (quotation omitted).

The Ninth Circuit has also held preclusion applicable when the initial and subsequent plaintiffs have identical legal claims and interests and are involved in the same effort, despite the absence of class certification or formal privity. Thus, in *United States v. ITT Rayonier, Inc.*, 627 F.2d 996 (9th Cir. 1980), the Ninth Circuit found privity between a state agency and a federal agency where both were attempting to enforce pollution requirements against a private company, such that the decision against the state agency was held to collaterally estop the federal agency from relitigating the

central issue in a federal enforcement action. Although the court expressly held that there was no agency relationship between the state and federal entities, it found the relationship close enough to preclude relitigation of the same issue. In *In re Schimmels*, 127 F.3d 875 (9th Cir. 1997), the court found privity sufficient to justify preclusion in the relationship of private *qui tam* relators and the federal government, even though there was no formal privity and each had an independent financial interest in the outcome, because it found a "unity of interest between the relators and the government." *Id.* at 883. *See also Chase Manhattan N.A. v. Celotex Corp.*, 56 F.3d 343, 345 (2nd Cir. 1995) (analysis of issue preclusion focuses on the parties' incentives to litigation); *see generally NAACP v. Hunt*, 891 F.2d 1555 (11th Cir. 1990) (applying Alabama preclusion law to bar an identical claim asserted by parties who, like the plaintiffs who had raised, and lost, the claim in an earlier suit, were members of the National Association for the Advancement of Colored People and of the Alabama Legislature, based on a finding of virtual representation and considerations of judicial economy).

The conflicts between these circuits with respect to the scope of privity and virtual representation provides strong evidence of the need for this Court's guidance. Under the restrictive approach adopted by the Seventh Circuit and others, preclusion will never apply to successive pilot suits. American will be required to relitigate, and the judicial system will be required to allocate precious resources to reconsider precisely the same argument with respect to precisely the same law and facts until precedent is established throughout the country. Under the broader approach adopted by the Eighth Circuit and others, the district court's decision in this case that preclusion is appropriate would have been affirmed.

Under that approach, the court would consider the fact that the *Tice* plaintiffs are members of the same group as the *Johnson* plaintiffs. All were members of a unit of airline pilots represented by the same union, and all were parties, through that union, to the same collective bargaining agreement that defined the terms and conditions of their employment and their pension benefits with American. Each attempted to use his employment seniority in American's cockpits under that collective bargaining agreement as the "currency" to purchase the right to work in the flight officer position after FAA-mandated retirement at age 60. Significantly, any ability to exercise their alleged rights to move to that third seat depends entirely on whether that collective bargaining agreement (and the custom and practice under that agreement)[5], which governs all of the employment terms and conditions of all sets of plaintiffs in these cases, allows them to "bid down" to that seat. Therefore, not only were the pilots asserting an identical statutory claim against American's training-seat policy, but they asserted a right that could be realized only through the terms of a contract that was common to all of them.

Under the *Tyus* approach, a court would consider that every American pilot is in the identical position when he or she reaches 60 years of age, and at that point has precisely the same interests as pilots who reached that age earlier. Thus, the *Tice* and *Johnson* plaintiffs had exactly the same interests, *when they brought suit*. The *Johnson* plaintiffs' incentive to

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5. *See United Steel Workers of America v. Warrior and Gulf Navigation Co.*, 363 U.S. 574, 581-82 (1960) (The collective bargaining agreement extends not only to the written language but also the practices of the industry and the "shop," from which a common law develops.).

prolong their cockpit careers by eliminating the training-seat policy is the same incentive the *Tice* plaintiffs have to prolong their cockpit careers. Moreover, it is the same incentive that every American pilot reaching 60 will have. Under this approach, the complete identity of claims, the complete identity of legal arguments and defenses, and the fact that these claims are being presented by members of the same employment group, bound by the same employment contract for the same position, necessarily lead to the conclusion that the *Johnson* plaintiffs' representation of the *Tice* plaintiffs' interests is adequate for purposes of preclusion. Here, in addition, the *Tice* plaintiffs are represented by the same counsel who represented the *Johnson* plaintiffs.

Thus, the "sharp division" among the circuits is one this Court should address, and one that is squarely presented by the case at bar. This Court's recent decisions in *Richards* and *South Central Bell Telephone Co. v. Alabama*, 119 S. Ct. 1180 (1999), did not reach the question presented here. Although *Richards* noted the expansion of the doctrine of privity by lower courts and their recognition of adequate representation, 517 U.S. at 798, neither that case nor *South Central Bell* required this Court to explore the scope or limits of that expansion. In both *Richards* and in *South Central Bell*, the subsequent plaintiffs were wholly unrelated to the initial plaintiffs. They were not members of the same group or parties to the same contractual arrangement, directly or indirectly. In deciding the questions presented by those cases, therefore, this Court had no need to consider whether preclusion is appropriate where plaintiffs have such a relationship. Further, unlike the *Johnson* plaintiffs, the initial litigants in *Richards* and *South Central Bell* had not sued on behalf of others similarly situated and had not given the court any indication that they intended to represent others.

B. The Circuits Disagree as to the Preclusive Effect of a Decision Against A Public Entity Which Had Attempted To Enforce Private Rights.

This case also presents a related question on which the circuits differ: the preclusive effect of a prior final judgment against a governmental authority where the government acts as a public enforcer of private rights. The court below held that a prior plaintiff's "status as a public body" has *no* impact on the collateral estoppel analysis. Pet. App. 16a-17a. In contrast, the Fifth, Ninth, and Tenth Circuits' view is that governmental authorities, because they are governmental authorities, may be found to have adequately represented other interested parties, even absent express or implied agreement, so as to preclude repetitive litigation of the same issues or claims. Thus, in *Southwest Airlines Co. v. Texas Int'l Airlines*, 546 F.2d 84, 98 (5th Cir.), *cert. denied*, 434 U.S. 832 (1977), the Fifth Circuit held that a prior decision in a suit brought by the City of Dallas precluded a later suit by Southwest Airlines because "the relationship between the city as public enforcer of the ordinance and the airlines as private enforcers is close enough to preclude relitigation." Indeed, the court found the role of the city as public enforcer sufficient to preclude subsequent private litigation by Southwest even though the city was pursuing its own corporate interest in the earlier litigation. It was deemed sufficient for preclusion that the result sought by the government, and the legal rights asserted, were the same as those sought and asserted by the airlines in the second litigation. *Id.* at 97-98.

In *Berman v. Denver Tramway Corp.*, 197 F.2d 946 (10th Cir. 1952), the Tenth Circuit held that a prior judgment against the City and County of Denver precluded a private party from

raising the same issues in a subsequent suit. The court found that the private party had been adequately represented by the local government entities even though there was no express or implied agreement and the private party did not have notice or an opportunity to participate in the earlier litigation.

In addition, the Ninth Circuit has noted that the

> relationship between governmental authorities as public enforcers of ordinances and private parties suing for enforcement as private attorneys general is close enough to preclude relitigation.

ITT Rayonier, 627 F.2d at 1003; *Schimmels*, 127 F.3d at 881. In the latter case, the Ninth Circuit found preclusion in an almost mirror image of the case at bar, holding that a private suit by relators in a *qui tam* action precluded the government from relitigating the issues, even though each had an independent financial interest, because the relator was required to provide notice to the government of the suit and the government had the authority to intervene. *Id.* at 882. In the initial litigation, the relators had provided notice, but the government had chosen not to intervene; nonetheless, the court precluded the government from relitigating the same issues, even for the purposes of recovering its own share of damages, in a second suit. *Id.*

In the case at bar, through the statutory charge processing procedure, employees alleging a violation of the ADEA must also provide notice to the EEOC, which may investigate and intervene or bring its own suit, precluding continuation of the employee's suit. *See* 29 U.S.C. § 626(c)-(d). In the case of the ADEA, moreover, the EEOC has no independent

interest in the outcome of the suit. It acts solely as a public enforcer of laws enacted on behalf of private parties.[6]

The preclusion analysis that is appropriate when a prior claim or position was litigated by a governmental authority enforcing a law for the benefit of the public is one this Court left open in *Richards*, 517 U.S. at 801-02. Contrary to the view of the court below, Pet. App. 16a-17a, this Court did not reject the argument that the City of Birmingham's status as a public body was relevant to the analysis. This Court found it unnecessary to reach that question because the *City* of Birmingham had not undertaken to represent the interests of the plaintiffs in the subsequent suit, who were *county* taxpayers. *Id.*

The question left open in *Richards*, however, is squarely and cleanly presented by this case. The federal agency charged with enforcing the ADEA on behalf of private employees has previously litigated whether American's policy with respect to the flight officer's seat is a *bona fide* occupational qualification. *See Murnane*, 482 F. Supp. at 138; *see also EEOC*, 48 F.3d at 167 (agency's challenge to American's policy is collaterally estopped "in light of the vindication of American's policies over the EEOC's challenge in *Murnane*"). Because plaintiffs challenge the same policy

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6. The Fifth and Ninth Circuits have also held governmental entities precluded by prior litigation involving a different governmental entity, even when there was no express or implied agreement or participation in the earlier litigation. *See Aerojet-General Corp. v. Askew*, 511 F.2d 710 (5th Cir. 1975) (prior judgment against state agencies precluded litigation of the same claim by Dade County); *United States v. ITT Rayonier*, 627 F.2d 996 (9th Cir. 1980) (prior judgment against state agency in state court precluded relitigation of the same issue by federal agency in federal court).

under the same statutory provisions, the case at bar presents the question whether the EEOC's prior enforcement litigation precludes relitigation of the same issue by those whom the EEOC is charged with protecting.[7]

This court should grant *certiorari* to resolve these conflicts among the circuits, and to furnish guidance to the state courts on the limits placed by the United States Constitution with respect to the preclusive effect of earlier adjudications.

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7. To the extent the decision below rested on the Seventh Circuit's reading of the ADEA to require a restrictive approach to preclusion, the decision is in serious tension with the Fifth Circuit's determination in *EEOC v. American*, 48 F.3d at 168. The Fifth Circuit held that the litigation of the *bona fide* occupational qualification issue by other pilots and the government in *Murnane* previously precluded the EEOC from relitigating the same issue on behalf of 47 new pilots. The Fifth Circuit found nothing in the statutory provisions or purposes of the ADEA to require more restrictive preclusion rules. Moreover, reconciling both circuit decisions would lead to an anomaly clearly at odds with the ADEA because it would permit an endless succession of private employees to challenge American's training-seat policy but preclude the EEOC from further challenges. Whatever else it provided, Congress clearly viewed the EEOC as its public attorney general, and preferred plaintiff, in ADEA suits. Thus, it not only permitted the EEOC to sue on behalf of employees, but provided that when the EEOC did so, the affected employees lost any right to sue on their own behalf. 29 U.S.C. § 626(b)-(c). To the extent that the Seventh and Fifth Circuit decisions can be reconciled, they turn that statutory preference on its head.

II.

THIS PETITION RAISES AN IMPORTANT QUESTION OF FEDERAL LAW CONCERNING NONPARTY PRECLUSION WHICH SHOULD BE DECIDED BY THIS COURT.

As Justice White observed for a unanimous Court in *Blonder-Tongue Laboratories*, 402 U.S. at 328, *res judicata* law must be re-examined from time to time to assure fairness in its application. "[P]reclusion offers the opportunity to eliminate litigation which is not necessary or desirable," such as harassment of private parties by repetitive litigation of the same claims. *Id.* at 328 n.18. *Blonder-Tongue* eliminated the requirement of mutuality in collateral estoppel because that requirement had allowed patent holders to command significant license fees from undercapitalized opponents simply by suing them, even though the patents had been found invalid by courts in other jurisdictions. *Id.* at 328.

The Court should address the scope of privity and virtual representation questions presented by this case because they have a significant impact on the allocation of judicial resources, and the adequacy, finality and fairness of adjudication. These issues arise in virtually all types of civil litigation, irrespective of subject matter.

The Seventh Circuit's restrictive approach places an unfair and unnecessary burden on private parties to defend themselves in repetitive litigation, regardless of how often their conduct has been found lawful. The cost of conducting discovery and litigating the same issues and claims over and over is very substantial and imposes a particular burden on regional and national companies who are forced to conduct

business in a haze of uncertainty, because successful litigation of a significant issue will not be "final" or bring them repose. Because the Seventh Circuit's rule requires businesses to endure *seriatim* identical litigation over policies that have repeatedly been adjudicated as lawful, both the businesses' and the courts' resources are severely taxed without advancing the causes of fairness or justice. In a system where precedent leads to summary dismissal of claims every day, the private and judicial resources of the nation should not be burdened by repetitious and identical challenges to policies and practices previously adjudicated to be legal.

American Airlines, like many businesses, operates in and is potentially subject to suit over this same policy in every court in the United States. Under the Seventh Circuit's rule, American will have to defend this same policy, a policy that has without exception been upheld as a *bona fide* occupational qualification, against repeated challenges from members of the same union seeking to exercise the same collective bargaining rights, free of American's training seat policy. The same counsel who brought the *Johnson* challenge, and now brings the *Tice* suit below, can change the caption and refile the *Johnson* complaint every time a captain turns 60. Theoretically, each of American's 9,000 pilots has a potential suit in one or another of the 94 federal district courts and the even more numerous state courts, and American will be deprived of any finality until there is governing precedent in every court. Under the decision below, American's unvaried success in defending the policy does not preclude relitigation of its lawfulness. Furthermore, under the decision below, the EEOC acting as a public attorney general on behalf of these same union members can continue to bring suit after suit challenging this policy under the ADEA even though that issue has been decided against the EEOC in prior litigation.

Interstate companies and employers, in particular, are therefore denied any repose after proving their practices are lawful under the applicable federal statutes. Instead, members of the plaintiff group, and the government agency on their behalf, may make successive attacks in "open circuits," burdening the resources of the company and the judiciary with repetitive relitigation of the policy's legality. The restrictive view adopted by the court below provides the same statutory question with an endless life, available to successive generations of American pilots, and converts such litigation into a "war of attrition," a strategy aimed at exacting settlements as the only means of avoiding litigation costs. At each juncture, therefore, American must choose whether its entirely lawful flight safety policy is simply too expensive to defend in repetitive litigation despite its unequivocal safety value for travelers.

As the Eighth Circuit observed, virtual representation is "particularly appropriate for public law disputes" because the potential number of plaintiffs for such claims is "limitless," and because allowing public law claims to be filed repetitiously, lends "immortality" to those claims. *Tyus*, 93 F.3d at 457, *citing Los Angeles Branch NAACP v. Los Angeles Unified School District*, 750 F.2d 731, 741 (9th Cir. 1984), *cert. denied*, 474 U.S. 919 (1985) (interpreting California law on virtual representation; prior judgment in state proceeding binds non-class members; no manifest injustice by preclusion of later suit). The potential supply of plaintiffs in this series of challenges to American's policy is limited only by the number of pilots at American, all of whom are members of the same union, all seeking to exercise seniority and job bidding procedures provided by the same collective bargaining agreement. Each has precisely the same legal interests, and at age 60, the same factual circumstances and

career prolonging incentives, making it fair to bind them by final judgments in litigation previously brought by identically motivated fellow members of the pilot's union. Further, the EEOC represents not only current and retired pilots interests, but also the interests of "over-age" applicants for the flight officer position. It is therefore fair to preclude pilots from relitigating issues that have previously been determined in a suit brought by that public agency, issues such as whether American's training-seat policy is a *bona fide* occupational qualification within the meaning of the ADEA.

In addition, the broader approach to preclusion in these circumstances would promote judicial economy by discouraging "fence sitting." *Tyus* 93 F.3d at 456-57. Under the Seventh Circuit's rule, potential plaintiffs have virtually no incentive to join others in challenging this employment policy. If those bringing the suit win, the fence sitters will have the benefit of an injunction against the policy, whether they joined as plaintiffs or not.[8] If the plaintiffs do not succeed, they remain free to "shop around" and bring the identical challenge in a different jurisdiction. The restrictive rule thus frustrates judicial administration by encouraging plaintiffs to "sit on the fence" and await the verdict in the earlier case, knowing they can bring a new suit if the first litigation is unsuccessful.

American has been in litigation with its retiring pilots, and with individuals who want to be hired as American pilots, over its training-seat policy since 1977 without a recess. Under the decision below, it can expect to remain in litigation over the identical claims and defenses until it is forced by

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8. *See Bowe v. Colgate Palmolive*, 489 F.2d 896 (7th Cir. 1973); *see also Baker v. Delta Air Lines, Inc.*, 6 F.3d 632 (9th Cir. 1993).

economics to determine that its completely lawful policy must be abandoned because it is too burdensome to defend. It is not in the public interest to force safety decisions to be made on this basis.

The Seventh Circuit's rule also encourages forum shopping by plaintiffs, and the EEOC, who can thereby avoid the operation of *stare decisis*. More of the *Tice* plaintiffs, for example, are residents of Texas than of any other jurisdiction. Pet. App. 5a. They chose to litigate in Illinois, and vigorously opposed transfer to a district court in Texas, where the challenged policy is administered, the relevant documents are housed, and most of the witnesses reside, in order to avoid Fifth Circuit precedent. The *Tice* plaintiffs, and their counsel, chose to litigate in Illinois because their claim could not survive motions to dismiss in Texas or in the District of Columbia.[9]

If, as precedent indicates is likely, the *Tice* plaintiffs lose again in Illinois, American pilots will simply add this judicial district to their list of venues to avoid and choose another district to litigate the next case.

This Court should grant *certiorari* to resolve the conflicts among the circuits with respect to the scope of privity and virtual representation. It is neither necessary, nor practical,

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9. *Cf. Roddie v. American Airlines, Inc.*, No. 4:96-CV-548-A (N.D. Tex. Sept. 9, 1996). Captain Roddie filed a complaint identical to *Johnson*'s and *Tice*'s in the Northern District of Texas while this case awaited adjudication of American's motion for judgment on the pleadings. In response, American answered and filed its motion for judgment on the pleadings in the Northern District of Texas. Roddie, recognizing circuit precedent, moved for voluntary dismissal *with prejudice* and his motion was granted.

to attempt to resolve every question that might arise at the outer limits of privity, but the lower courts need this Court's guidance as to whether preclusion is available only in cases of formal privity, or whether federal courts may look closely at the actual relationship between initial and subsequent plaintiffs to determine whether preclusion would serve the important objectives of judicial economy and adequacy, finality and fairness of adjudication, without infringing on the subsequent plaintiffs' due process rights. Currently, in those circuits that have adopted the restrictive approach, courts may not even consider whether plaintiffs are members of the same group, standing in identical positions, and seeking to exercise privileges afforded by the same contractual agreements. That view imposes substantial burdens on judicial resources and on defendants who are subject to harassment from successive and repetitive challenges until they surrender judgments already won, rather than incur the cost of defending again.

CONCLUSION

For the reasons stated, the Court should grant the petition for *certiorari*.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED DECEMBER 17, 1998

In the
United States Court of Appeals
For the Seventh Circuit

Nos. 97-1888 & 97-2027

Robert H. Tice, et al.,

Plaintiffs-Appellants, Cross-Appellees,

v.

American Airlines, Inc.,

Defendant-Appellee, Cross-Appellant.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 95 C 6890 — Ann C. Williams, Judge.

Argued November 7, 1997 — Decided December 17, 1998

Before Coffey, Flaum, and Diane P. Wood, Circuit Judges.

Diane P. Wood, Circuit Judge. It is a fundamental principle of American law that every person is entitled to his or her day in court. Multiple victims of air disasters, multiple stockholders of companies that have committed securities violations, and multiple holders of rights in pensions,

normally may all bring their own suits even if the defendant engaged in a single course of action that affected everyone similarly. One formal exception to this principle is the class action, recognized in federal court under Fed. R. Civ. P. 23. The vigor with which the defense bar has often opposed class certifications might cause one to think that defendants prefer to take their cases one at a time, but that would be too simplistic a view. In fact, the existence and incidence of another exception to the general rule, the doctrine of virtual representation, suggests that defendants sometimes like the benefits of a group result — because it is usually defendants who argue that a new group of plaintiffs is barred from bringing an action since the plaintiff in an earlier suit was its "virtual representative."

This case requires us to explore what courts have actually meant when they have referred to virtual representation, and what if any independent significance that concept has. The district court dismissed the claims of American Airlines pilot Robert Tice and his eleven colleagues on the ground that they were bound by the result reached in a different lawsuit brought by different pilots, in which essentially the same American Airlines policy was challenged under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. sec. 623(a)(1), (2). The Tice plaintiffs argue that this was error, because they were represented neither formally nor "virtually" in the earlier case, Johnson v. American Airlines, Inc., 745 F.2d 988 (5th Cir. 1984), and it would thus violate due process to preclude them from bringing their own suit. American has cross-appealed, claiming that the district court abused its discretion in refusing to transfer this case to the Northern District of Texas pursuant to 28 U.S.C. sec. 1404(a).

Appendix A

I

At the center of this case is the way that American Airlines has responded to the Federal Aviation Administration (FAA) rule providing that no person may serve as a pilot if that person has reached the age of 60. See 14 C.F.R. sec. 121.383(c); Baker v. FAA, 917 F.2d 318 (7th Cir. 1990). This rule covers only the positions of pilot and copilot, and it thus does not prevent former pilots from serving as flight officers after their 60th birthday. The flight officer, third in command of commercial passenger aircraft, monitors the aircraft's fuel, electrical, hydraulic and other systems before, during and after the flight, but does not pilot the aircraft. The reason why American does not permit people who they determine are too old to be pilots to bid for or hold the flight officer position is because it has a rigid "up-or-out" policy under which all flight officers must be eligible to advance to the position of pilot. See Murnane v. American Airlines, Inc., 667 F.2d 98, 99 (D.C. Cir. 1981). That rule permits American to use the flight officer slot as a training ground for future pilots — a practice that would obviously be impossible if individuals deemed ineligible for the pilot's job were to occupy those positions.

American has successfully defended its policy twice before. The first time was in the Johnson litigation mentioned above, a case brought by 22 pilots as a group action authorized by the ADEA, see 29 U.S.C. sec. 626(b) (incorporating 29 U.S.C.sec. 216(b) of the Fair Labor Standards Act), in which the Fifth Circuit upheld a jury verdict that American's up-or-out policy qualified as a bona fide occupational qualification (BFOQ) for purposes of the ADEA. See also

Murnane, 667 F.2d 98 (upholding a related aspect of the then-extant version of American's up-or-out policy under which it would not hire anyone over the age of 30 to be a flight officer). The second time was in an action brought by the Equal Employment Opportunity Commission (EEOC) under the ADEA on behalf of a class of named pilots age 40 and over who applied for and were denied employment with American as flight officers because, under the current version of the up-or-out policy, they would not have enough time to progress to the rank of Captain and work there long enough to satisfy American. See EEOC v. American Airlines, Inc., 48 F.3d 164 (5th Cir. 1995) (EEOC).

The Tice plaintiffs, however, did not participate in those earlier cases, and the claims they present are somewhat different: because they were already American pilots, they are not complaining about a failure to be hired. Instead, they were forced to retire when they turned 60, because the up-or-out policy prevented them from "downbidding," which is the mechanism by which they might transfer back to the flight officer level. (In the absence of American's policy, downbidding would probably have been easy for them, because the flight officer position, while not affected by the FAA's rule that commercial pilots and copilots be under 60, is on the same union seniority list as that maintained for pilots.) The Tice plaintiffs point out that American permits or requires pilots below the age of 60 to downbid to flight officer in a variety of situations, and, according to the Tice plaintiffs, all other major U.S. airlines now permit their pilots who turn 60 to downbid in this manner. The "downbidding" claim never arose in the Murnane or EEOC litigation, and the Tice plaintiffs stress that they were American employees,

either working as pilots or in line to become pilots, at the time those cases were pending, and thus they were unaffected by the initial hiring rules. Even though the claims of the Tice plaintiffs are quite similar to those of the Johnson plaintiffs, the Tice plaintiffs stress that they had not yet been subjected to the ban on downbidding at the time of that case. In fact, they were actually excluded from the class eligible to join that litigation as plaintiffs because they were too young at the relevant time. Furthermore, their interests at the time diverged from those of the Johnson plaintiffs (forcing out older workers can be thought to help younger workers, on at least a surface level), which suggests that the Johnson plaintiffs could not have adequately represented them.

II

Shortly after the plaintiffs filed their complaint, American moved for a transfer of venue to the U.S. District Court for the Northern District of Texas under 28 U.S.C. sec. 1404(a), arguing that most witnesses and evidence were located there, including a flight simulator at American's facility at the Dallas-Fort Worth Airport (DFW) that could not be transported out of Texas, that the principal situs of American's operations is in the Northern District of Texas, and that more of the named plaintiffs resided in Texas than in Illinois. American pointed out as well that the Johnson case, which eventually wound up in Texas, had also begun in Illinois and had been transferred for many of the same reasons American was urging here. The Tice plaintiffs responded that almost the same number of plaintiffs were based at O'Hare Airport, in Chicago, as at DFW, that most documents had already been produced, and that American engaged in enough business in

Illinois through its extensive operations at O'Hare, American's largest international airport, to warrant respecting their choice of forum.

The court denied American's motion, stating its reasons in open court. It found that from the standpoint of convenience to parties and witnesses the advantages of the two districts were relatively evenly balanced. The court also expressed skepticism that American's flight simulator at DFW was truly unique, or (more importantly) that such a machine would be useful in any event at a jury trial. When American renewed the motion after another similar case was filed in the Northern District of Texas, Roddie v. American Airlines, Inc., 4:96-CV-548-A (N.D. Tex. Sept. 9, 1996), the court denied it again.

American then moved for judgment on the pleadings, under Fed. R. Civ. P. 12(c), on the ground that the doctrine of claim preclusion applied here. The court (Judge Ann C. Williams taking over for Judge Brian Barnett Duff) granted the motion. The district court found that under federal principles of preclusion American had to show three things: (1) a final judgment on the merits in an earlier action, (2) an identity of the cause of action in both the earlier and the later suit, and (3) an identity of parties or their privies in the two suits. The first element was undisputed, and the court found that for the second element the question in both cases was whether American's policy violated the ADEA. That left the third element, which is central to this appeal. The court recognized that the Tice plaintiffs were not formal parties to the Johnson action and that "privity" could exist only if the doctrine of virtual representation applied. (It also noted that neither Murnane nor EEOC precluded the Tice plaintiffs'

claim, because of the differences between the class of people seeking to be hired and the class of people seeking to avoid compulsory retirement.) After noting that no express analytical framework was available to delineate clearly when virtual representation should or should not be applied, the district court, guided mainly by earlier decisions from the Northern District of Illinois, concluded that the Tice plaintiffs had been "virtually represented" by the Johnson plaintiffs.

III

We agree with the district court on one basic point: the doctrine of virtual representation is amorphous. Indeed, in our view the term itself illustrates the harm that can be done when a catchy phrase is coined to describe a perfectly sensible result. The phrase takes on a life of its own, and before too long, it starts being applied to situations far removed from its intended and proper context. In the case of "virtual representation," the concept had its origin in the field of probate proceedings, in which "it is often necessary to establish a procedure that will bind persons unknown, unascertained, or not yet born." 18 Charles Alan Wright et al., Federal Practice and Procedure sec. 4457 at 494 (1981) (hereinafter Wright). In that narrow setting, courts would find an identity of interests between the representatives who participated in the litigation and other individuals whose interests were clearly aligned with those of the actual litigants. In the argot of res judicata law, the technical nonparties were treated as parties to the first suit for purposes of assessing its preclusive force.

Branching out from those roots, the term "virtual representation" began to be referred to as a doctrine. As such, its scope broadened in a line of cases from the Fifth Circuit, most notably Aerojet-General Corp. v. Askew, 511 F.2d 710 (5th Cir. 1975), in which the court explained the theory as follows:

> Under the federal law of res judicata, a person may be bound by a judgment even though not a party if one of the parties to the suit is so closely aligned with his interests as to be his virtual representative.

Because, under the Aerojet conception, virtual representation offers one way to bind a nonparty to the results of an earlier case, it is apparent that this concept, or doctrine, stands at the intersection of two important principles of civil litigation: the right, grounded both in due process and in the property right represented by the lawsuit chose in action, of each individual to assert her own claim; and the need of litigants and the judicial system alike for finality of decisions after a full and fair airing of a matter.

The difficult question here is to decide what an idea of "virtual" representation legitimately can add to the law of preclusion that is not already captured by a flexible inquiry into what used to be called "privity." As this court noted in In the Matter of L&S Industries, Inc., 989 F.2d 929 (7th Cir. 1993), "privity" is now seen as "a descriptive term for designating those with a sufficiently close identity of interests." Id. at 932. Quoting with approval from Wright sec. 4449, at 418-19, the court acknowledged that "the privity label simply expresses a conclusion that preclusion is proper."

Id. at 933. In a similar vein, the Second Circuit cautioned against an overly formalistic approach to privity in Chase Manhattan Bank, N.A. v. Celotex Corp., 56 F.3d 343 (2d Cir. 1995), observing that "[w]hether there is privity between a party against whom claim preclusion is asserted and a party to prior litigation is a functional inquiry in which the formalities of legal relationships provide clues but not solutions." Id. at 346. See also In re Schimmels, 127 F.3d 875, 881 (9th Cir. 1997). Indeed, in Schimmels the court at one point implied that "virtual representation" just describes a form of privity. Id., citing Aerojet.

We think the term "virtual representation" has cast more shadows than light on the problem to be decided. As a matter of fact, a finding that nonparties were virtually represented in earlier litigation has rarely been used actually to bar litigation. As far as we can tell, no published opinion by this court has done so, although one published order has, see Henderson v. Stone, 930 F.3d 25 (table), 1991 WL 54855 (7th Cir. 1991), and the doctrine was of indirect relevance in another order. Goodluck v. City of Chicago, 70 F.3d 1274 (table), 1995 WL 687637 (7th Cir. 1995). The Wright treatise observes that "[a]ll of the cases that in fact preclude relitigation by a nonparty have involved several factors in addition to apparently adequate litigation by a party holding parallel interests." Wright, sec. 4457 (1998 Supp.) at 420. Examples of these additional factors include control or participation in the earlier litigation, acquiescence, deliberate maneuvering to avoid the effects of the first case, or the close relationship between the parties to the various cases. E.g., Tyus v. Schoemehl, 93 F.3d 449, 454-56 (8th Cir. 1996) (adding that the doctrine is more appropriate in public law

cases); NAACP v. Metropolitan Council, 125 F.3d 1171, 1175 (8th Cir. 1997), vacated, 118 S. Ct. 1162, reinstated, 144 F.3d 1168 (8th Cir. 1998); Bittinger v. Tecumseh Prod. Co., 123 F.3d 877, 881 (6th Cir. 1997); Collins v. E.I. Dupont de Nemours & Co., 34 F.3d 172, 175-78 (3d Cir. 1994); see also Wright, et al., 18 Federal Practice and Procedure: Jurisdiction sec. 4457, at 502.

These factors are all merely heuristics, however, shortcuts that courts use to determine the answer to the real (fact-specific) question — whether there was (or should be implied at law) the kind of link between the earlier and later plaintiffs that justifies binding the second group to the result reached against the first. See also McNealy v. Caterpillar, Inc., 139 F.3d 1113, 1116-17 (7th Cir. 1998) (preclusion improper where the issues litigated in the two actions are different). This is, of course, the same question we and other courts have already identified as the crux of the privity inquiry. A proper functional analysis of privity, focusing on the general question whether the earlier parties were in some sense proper agents for the later parties, would therefore support preclusion in the cases that have used the lingo of virtual representation. Conversely, if a relationship between a nonparty and an earlier litigant does not satisfy this analysis, serious due process problems would arise if the earlier nonparty were barred from her own day in court.

Our conclusion is fortified by the way the Supreme Court handled an analogous problem in Richards v. Jefferson County, 517 U.S. 793 (1996). Like our case, Richards involved two rounds of litigation directed at the same policy — there, the validity of an occupation tax imposed by

Jefferson County, Alabama. The first case had been brought in Alabama state court by the acting director of finance for the city of Birmingham and the city itself, and later had been consolidated for trial with a separate suit brought by three county taxpayers. Eventually, the case ended up in the Supreme Court of Alabama, which upheld the tax. The second case was brought (again in state court because of the Tax Injunction Act, 28 U.S.C. sec. 1341) by a class of all nonfederal employees subject to the county's tax, who claimed that the tax violated the U.S. Constitution's due process and equal protection clauses, as well as similar Alabama constitutional guarantees. The Supreme Court of Alabama agreed with the lower courts that the second suit was barred by the adjudication in the first, because there was a "substantial identity of parties" and the same cause of action was presented. The U.S. Supreme Court reversed, finding that the state supreme court's holding violated the federal due process rights of the second group of plaintiffs.

The Court began by reiterating principles that are of equal relevance here:

> [I]n Anglo-American jurisprudence . . . one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process. This rule is part of our deep-rooted historic tradition that everyone should have his own day in court. As a consequence, a judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings.

517 U.S. at 798 (internal quotations and citations omitted). The Court also acknowledged that formal party status is not always necessary to bind a party, and that the term "privity" now extends beyond traditional formal relationships such as guardian and ward or trustee and beneficiary. Id. Nevertheless, the Court found, the Richards plaintiffs could not be barred by the earlier Alabama litigation. It squarely rejected the Alabama Supreme Court's conclusion that res judicata could apply because the later plaintiffs were adequately represented in the earlier suit, not because it disagreed with the Alabama court's assessment of the nature of the earlier representation, but because this fact alone was not enough to bar the second suit. The parties in the earlier case did not provide the later plaintiffs with any notice that a suit was pending that would conclusively resolve their legal rights. The earlier suit was not on behalf of a class that included the later plaintiffs, and the fact that the city participated in the earlier case did not expand its preclusive scope either. Id. at 801-02.

Richards therefore stands as an example both of the functional approach that is required for privity analysis and of the importance the Court attaches to assuring each person his or her own day in court. From this functional standpoint, a conclusion that the interests of the nonparties were sufficiently aligned with the earlier litigants would be impossible unless, among other things, the earlier litigants would have been adequate representatives of the later litigant(s). See id. at 800-01; Wright, et al., 18 Federal Practice and Procedure: Jurisdiction sec. 4457, at 495, 502 (1981 & Supp. 1998); id. at 421-22 (Supp. 1998). As we noted in Ahng v. Allsteel, Inc., 96 F.3d 1033, 1037 (7th Cir. 1996),

a case in which we also refused to preclude later litigation because of virtual representation, "the doctrine of 'virtual representation' recognizes, in effect, a common-law kind of class action. It applies only when there is a practical identity of interests between the former litigant and the present one." (As we explain below, the fact that virtual representation looks like a class action but avoids compliance with Rule 23 is a weakness, not a strength, of the doctrine.) In properly certified class actions, parties who have adequate notice and (at a minimum) an opportunity to opt out of an earlier case may, if their interests are sufficiently aligned with one of the earlier parties, be bound by the results of that litigation. See, e.g., Hansberry v. Lee, 311 U.S. 32 (1940); and Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985). This is the theory on which Rule 23 is based. The class action cases allowing preclusion after adequate notice and the opportunity to opt out recognize a form of consent that is enough to justify binding the later parties to the earlier result (again, when the other criteria such as identity of issue and interest are also satisfied).

Unless there is a properly certified class action, handled with the procedural safeguards both state and federal rules afford, normal privity analysis must govern whether nonparties to an earlier case can be bound to the result. There would be little point in having Rule 23 if courts could ignore its careful structure and create de facto class actions at will; indeed, the Supreme Court's recent decision in Amchem Products, Inc. v. Windsor, 117 S.Ct. 2231 (1997), emphasizing the importance of following Rule 23's procedures for settlement classes, suggests that such an approach would be unauthorized. Instead, the appropriateness

of preclusion will depend on how closely the two sets of interests coincide and the role the absentees played in the earlier litigation. At a minimum, the issue on which preclusion is sought must be common to both cases, and the claims or defenses of the two allegedly equivalent parties (earlier litigant, present litigant) must be the same. See McNealy, 139 F.3d at 1116-17. In addition, unless a formal kind of successor interest is involved (e.g., subsequent landowner, successor corporation), there should be some indication not only that the second party was aware that the first litigation was going on and that the earlier litigation would resolve its claims, cf. Shutts, 472 U.S. at 811-12 (emphasizing the need for absentee parties to have the right at least to notice and an opportunity to opt out of litigation), but also that the second party either had participated or had a legal duty to participate. Finally, of course, the due process rights of absentees that the decisions in Hansberry, Shutts and Richards recognized must be respected.

Turning to the case before us, we conclude that the district court should have allowed the Tice plaintiffs to proceed with their suit. As the EEOC pointed out in its amicus brief in this court, the statute establishing the rights they are seeking to vindicate makes it quite clear that these rights are individual, not group-based. The ADEA provides that "[n]o employee shall be a party plaintiff to any . . . action [under it] unless he gives his consent in writing. . . ." 29 U.S.C. sec. 216(b) (incorporated into the ADEA by 29 U.S.C. sec. 626(b)). American does not claim that the Tice plaintiffs ever gave their consent in writing to any of the earlier cases upon which it relies. Second, as we noted in Woodall v. Drake Hotel, Inc., 913 F.2d 447, 450 (7th Cir. 1990), ADEA group actions

are "opt-in" rather than "opt-out," as a result of the "consent in writing" requirement, and thus differ importantly from the class actions available under Rule 23. The additional protections of this system compared to Rule 23 "opt-out" class actions would be eviscerated were the Tice plaintiffs to be viewed as having been in privity with the earlier plaintiffs.

Beyond the specifics of the ADEA, there are too many differences between the Tice plaintiffs and the plaintiffs in the earlier cases to make preclusion appropriate. The same flaw exists here as we found in Ahng, namely, the dissimilarity of the two groups of plaintiffs. The EEOC and Murnane plaintiffs could not have represented the interests of the Tice group, because the class of persons complaining that they were not hired because of American's age policies is inherently different from the class of existing employees. What helps the one may directly hurt the other. Cf. Rutherford v. City of Cleveland, 137 F.3d 905, 910 & n.5 (6th Cir. 1998); General Tel. Co. of the Northwest v. EEOC, 446 U.S. 318, 331 (1980); Hill v. Western Elec. Co., 596 F.2d 99, 102 (4th Cir. 1979). Furthermore, at the time of the Johnson case, the interests of American pilots over 60 (the plaintiffs there) diverged from the interests of American employees under the age of 60 (which the Tice plaintiffs were during the course of that litigation), since the younger pilots might well have wanted their elders forced out, freeing up more positions for themselves.

Finally, the factors that have persuaded earlier courts to find preclusion, either under the rubric of virtual representation or otherwise, do not point in that direction here. There is no evidence of manipulative litigation practices, and

we reject American's suggestion that the Tice plaintiffs' decision to retain the same counsel as the Johnson plaintiffs amounts to an improper practice. Collins, 34 F.3d at 178; Benson and Ford, Inc. v. Wanda Petroleum Co., 833 F.2d 1172, 1174 (5th Cir. 1987); but see Tyus, 93 F.3d at 456-57. The Tice plaintiffs did not and could not have taken part in any of the earlier challenges to American's policy, nor did they acquiesce to being represented indirectly by those plaintiffs. Aside from the fact that both groups of pilots were employed by American, there is no evidence of any relationship between the Tice and Johnson plaintiffs. Cf. Bittinger, 123 F.3d at 881-82; Collins, 34 F.3d at 176-77. If American's position were taken to its logical conclusion, the fact that the plaintiff in Plessy v. Ferguson, 163 U.S. 537 (1896), lost would have been enough to preclude the plaintiffs half a century later in Brown v. Board of Education, 347 U.S. 483 (1954). In light of the Supreme Court's continuing solicitude for each person's right to pursue her own case, we cannot strain preclusion principles this much.

For similar reasons we do not agree with American that the EEOC served as the Tice plaintiffs' representative in EEOC, supra. The EEOC brought that case to enforce the rights of 57 specifically named parties, none of whom is involved in the Tice litigation. It was therefore plainly not acting as the actual representative of the Tice plaintiffs. See 29 U.S.C. sec. 626(c)(1); cf. EEOC v. U.S. Steel Co., 921 F.2d 489, 494-95 (3d Cir. 1990). The argument that the EEOC was a virtual representative rests on the grounds we rejected above, as well as on its status as a public body. Its status as a public body does not change our earlier analysis — Richards did not accept a similar argument with respect to the city of

Birmingham, 517 U.S. at 802 n.6, and we think the same result follows here. American's final argument, that issue preclusion should apply here even if claim preclusion does not, fails for all the reasons the earlier argument failed, because "[c]ollateral estoppel . . . holds only between the same parties." United States v. Brocksmith, 991 F.2d 1363, 1367 (7th Cir. 1993) (citations omitted); Baker v. General Motors Corp., 118 S. Ct. 657, 666 n.11 (1998).

IV

Because we are reversing the district court's decision that the Tice plaintiffs' suit is precluded by the Johnson litigation (or other earlier suits), we must also reach American's cross-appeal challenging the district court's denial of its motion to change venue. American's problem is, in a phrase, the standard of review. "We give great deference to a district court's rulings on motions to transfer venue. Indeed, this court can only reverse a district court's determinations in this regard if we find a 'clear abuse of discretion.' " In re Chicago, Milwaukee, St. Paul & Pacific R.R. Co., 974 F.2d 775, 789 (7th Cir. 1992), quoting Cote v. Wadel, 796 F.2d 981, 985 (7th Cir. 1986). Even if we agreed with American that the Northern District of Texas would be a very convenient forum, that is not enough to support a finding that the district court abused its discretion in concluding that the Northern District of Illinois is also a convenient forum. In opposition to the factors to which American pointed, the district court gave some weight (as it was entitled to do) to the plaintiffs' choice of forum, to the relative ease with which American (an airline company) could transport its employees between Texas and Illinois, to the questionable relevance and need at trial for

the Dallas flight simulator, and to the fact that essentially the same number of plaintiffs were employed at O'Hare as at DFW. Under the circumstances, we do not find reversible error in the district court's decision.

We therefore Reverse the district court's judgment for American and Remand for further proceedings consistent with this opinion. We Affirm the district court's ruling denying American's motion to transfer the case to the Northern District of Texas.

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DATED MARCH 31, 1997

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

Case No. 95 C 6890

ROBERT H. TICE, et al.,

Plaintiff,

v.

AMERICAN AIRLINES, INC.,

Defendant.

MEMORANDUM OPINION AND ORDER

On November 27, 1995, plaintiffs Robert H. Tice and other former American Airline pilots ("plaintiffs"), filed their complaint against defendant, American Airlines, Inc. ("American") alleging that American violated the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621 et seq. (1994). The matter is before the court on American's Motion for Judgment on the Pleadings pursuant to Federal Rule of Civil Procedure 12(c). For reasons set forth below, the court grants American's motion.

Appendix B

Background

I. Current Case

The Federal Aviation Administration's ("FAA") "Age 60 Rule", 14 C.F.R. § 121.383(c), provides that no person may serve as a pilot if that person has reached his/her sixtieth birthday. The "Age 60 Rule", however, does not prevent former pilots from serving as flight officers after their sixtieth birthdays.[1] (Complaint ¶ 10.) Plaintiffs, twelve retired American captains, wanted to continue their careers after their sixtieth birthdays in the flight officer (flight engineer) position. (Complaint ¶ 11; Pls.' Reply to Def.'s Mot. at 1.) American, however, refused to downbid plaintiffs to the flight officer position, thus forcing plaintiffs to retire.[2] (Complaint ¶¶ 12-13.)

Plaintiffs claim American's refusal to downbid them to the flight officer position was because of age and, thus,

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1. American's aircraft operating crew mainly consists of a captain [pilot], copilot, and flight officer. The captain is in command of all aspects of the aircraft and its crew. The copilot, second in command, assists the captain in flying the aircraft. The flight officer monitors the aircraft's fuel, electrical, hydraulic and other systems before, during, and after the flight but does not pilot the aircraft. *Johnson v. American Airlines*, 745 F.2d 988, 990 (5th Cir. 1984), *cert. denied*, 472 U.S. 1027 (1985); *See also Equal Employment Opportunity Commission ("EEOC") v. American Airlines*, 48 F.3d. 164, 165 (5th Cir. 1995).

2. A "downbid" is a request by an employee to move from a position of seniority to a lesser position.

violates the ADEA. (Complaint ¶ 19.) In response, American moves this court for judgment on the pleadings. In *Johnson v. American Airlines*, 745 F.2d 988 (5th Cir. 1984), *cert. denied*, 472 U.S. 1027 (1985), the Fifth Circuit allowed American's policy of hiring only future captains as flight officers to stand. Consequently, American argues that, in light of *Johnson*, the doctrine of res judicata [claim preclusion] or collateral estoppel [issue preclusion] bars plaintiffs' claim.[3]

II. Earlier Suit

In *Johnson*, twenty-two ex-captains for American, represented by plaintiffs' attorney, sued American for violating the ADEA. *See id.* at 990-991. Their action arose at the intersection of the FAA's "Age 60 Rule" and American's up-or-out policy. *See id.* at 991. The plaintiffs, American flight crew members, desired employment as flight officers after their sixtieth birthdays since they could no longer serve as pilots under the "Age 60 Rule". *Id.* at 991. American's up-or-out policy, however, requires that all flight officers be capable of advancing to pilot positions. *Id.*; *See also EEOC*, 48 F.3d at 165 (citation omitted). Therefore, pilots over the age of sixty can not downbid to flight officer because American requires that all flight officers be able to advance to the pilot position. In other words, a sixty year old flight officer can not advance to the pilot position under the

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3. American also argues that the D.C. and Fifth Circuit's decisions in *Murnane et al. v. American Airlines, Inc.*, 482 F. Supp. 135 (D.D.C. 1979), *aff'd*, 667 F.2d 98 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 915 (1982) and *EEOC v. American Airlines, Inc.*, 48 F.3d 164 (5th Cir. 1995), respectively, preclude plaintiffs' claim. For the reasons set forth below, however, the court disagrees.

Age 60 Rule and American's up-or-out policy. *Id.*; *See also EEOC*, 48 F.3d at 165 (citation omitted). Based on this policy, American, allegedly in violation of the ADEA, refused to downbid the sixty-year-old, ex-captains to the flight officer position. *See id.*

In response, American claimed its up-or-out policy was a bona fide occupational qualification ("BFOQ").[4] *See id.* At trial, American presented evidence of the various effects of employing sixty-year-old, ex-captains as flight officers when they could no longer advance to the captain position because of the "Age 60 rule". *See id.* The jury found in favor of American, concluding that American's policy was in fact a BFOQ and, therefore, American's actions did not violate the ADEA. *See id.* The *Johnson* plaintiffs appealed, arguing that the trial court erred in instructing the jury.[5] *See id.* The Fifth Circuit, however, held that the district court did not commit reversible error and affirmed the jury's verdict. *See id.* at 995 ("We conclude that American's reasons for its policy qualify as a BFOQ defense.").

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4. A BFOQ is a qualification for employment that is "reasonably necessary to the normal operation of the business," even though it may result in what would otherwise constitute prohibited discrimination. 29 U.S.C. § 623(f)(1). The ADEA allows an employer to discriminate on the basis of age if the employee's age is a BFOQ. *See Johnson*, 745 F.2d at 991.

5. The *Johnson* plaintiffs presented various other arguments to the Fifth Circuit, however, they are not relevant to this court's discussion. *See Johnson*, 745 F.2d 988.

Appendix B

Motion for Judgment on the Pleadings

The court reviews a Rule 12(c) motion for judgment on the pleadings under the same standard as a Rule 12(b)(6) motion to dismiss. *See Frey v. Bank One*, 91 F.3d 45, 46 (7th Cir. 1996), *cert. denied*, 117 S.Ct. 954 (1997); *Alexander v. City of Chicago*, 994 F.2d 333, 335 (7th Cir. 1993); *Thomason v. Nachtrieb*, 888 F.2d 1202, 1204 (7th Cir. 1989). Thus, the court accepts as true all well-pleaded factual allegations and draws all reasonable inferences in favor of the non-moving party. *See United States v. Wood*, 925 F.2d 1580, 1581 (7th Cir. 1991) (citation omitted); *See also Zinermon v. Burch*, 494 U.S. 113, 118 (1990) (motion to dismiss); *Colfax Corp. v. Illinois State Toll Highway Auth.*, 79 F.3d 631, 632 (7th Cir. 1996) (motion to dismiss) (citation omitted). The court will not grant the motion unless "it appears beyond doubt that the plaintiff cannot prove any facts that would support his claim for relief." *Frey*, 91 F.3d at 46; *Thomason*, 888 F.2d at 1204.

The court, however, need not strain to find inferences favorable to plaintiffs which are not apparent on the face of the complaint; on the other hand, it will resolve ambiguities in plaintiffs favor. *See Early v. Bankers Life and Casualty Co.*, 959 F.2d 75, 79 (7th Cir. 1992) (motion to dismiss); *Coates v. Illinois State Bd. of Educ.*, 559 F.2d 445, 447 (7th Cir. 1977) (motion to dismiss). Additionally, the court "may not look beyond the pleadings, and all uncontested allegations to which the parties had an opportunity to respond are taken as true."[6] *Alexander*, 994 F.2d at 335. The court, however,

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6. Plaintiffs argue that American's motion for judgment on the pleadings does not comply with Fed. R. Civ. P. 12(c) and must be (Cont'd)

"may take into consideration documents incorporated by reference to the pleadings." *Wood*, 925 F.2d at 1582 (citation omitted). Lastly, the court may take judicial notice of matters of public record. *See Henson v. CSC Credit Servs.*, 29 F.3d 280, 284 (7th Cir. 1994); *Wood*, 925 F.2d at 1582.

Analysis

The main issue before the court is whether the doctrine of res judicata[7] bars plaintiffs from litigating this ADEA suit. In this ADEA suit, plaintiffs seek appraisal of their rights regarding American's refusal to downbid sixty-year-old captains to the flight officer position. If *Johnson* precludes plaintiffs' claim, however, then the court will not reappraise plaintiffs' rights. Because *Johnson*, the alleged preclusive action, was a federal court case, federal principles determine what preclusive effects, if any, it has on the present plaintiffs' action. *See EEOC v. Harris Chernin, Inc.*, 10 F.3d 1286, 1289

(Cont'd)
denied on its face. Plaintiffs support this argument by stating that American's success on this motion depends upon the court accepting certain representations that American failed to introduce in its answer. The court, however, disagrees with this argument. Rather, as discussed below, the court is rendering its decision based solely on allegations in plaintiffs' complaint.

7. Some courts and commentators use the term "res judicata" to encompass both forms of preclusion — claim preclusion and issue preclusion. *See Allen v. McCurry*, 449 U.S. 90, 94 n.5 (1980). More specifically, the Restatement of Judgments refers to "claim preclusion" as res judicata and "issue preclusion" as collateral estoppel. *See id.* (citing Restatement (Second) of Judgments § 74 (Tent. Draft No. 3, Apr. 15, 1976)).

n.4 (7th Cir. 1993) (citing *Barnett v. Stern*, 909 F.2d 973, 977 (7th Cir. 1990)) ("[w]here the earlier action is brought in federal court, the federal rules of res judicata apply."); *In re Energy Coop., Inc.*, 814 F.2d 1226, 1230 (7th Cir.), *cert. denied*, 484 U.S. 928 (1987); *accord Porn v. National Grange Mut. Ins. Co.*, 93 F.3d 31, 33-34 (1st Cir. 1996). Furthermore, under the doctrine of res judicata or collateral estoppel, district judges treat decisions by other district judges and other circuits as controlling. *See Colby v. J.C. Penney Co.*, 811 F.2d 1119, 1124 (7th Cir. 1986) (explaining that different outcomes in different courts may place a defendant under inconsistent obligations).

In a classic discussion of the federal principles of issue and claim preclusion, the Supreme Court explained:

> A fundamental precept of common-law adjudication, embodied in the related doctrines of collateral estoppel [or issue preclusion] and res judicata [or claim preclusion], is that a 'right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit between the same parties or their privies. . . .'Under collateral estoppel [or issue preclusion], once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation.

Montana v. United States, 440 U.S. 147, 153 (1979) (citations omitted); *see Allen v. McCurry*, 449 U.S. 90, 94 n.5 (1980)

(clarifying terminology). The Supreme Court went on to observe that

> Application of [res judicata and collateral estoppel] is central to the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdiction. To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.

Montana, 440 U.S. at 153 (citations omitted).

Claim preclusion requires that two suits be linked by the same cause of action. If this link exists, claim preclusion operates as a bar to all issues previously litigated or potentially litigated in the initial litigation. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979). Res judicata or claim preclusion applies only if there exists: (1) a final judgment on the merits in an earlier action; (2) an identity of the cause of action in both the earlier and later suit; and (3) an identity of parties or their privies in the two suits. *Brzostowski v. Laidlaw Waste Systems, Inc.*, 49 F.3d 337, 338 (7th Cir. 1995) (citation omitted); *Hartke v. Chicago Board of Election Commissioners*, 651 F. Supp. 86, 88 (N.D. Ill. 1986).

Issue preclusion, on the other hand, requires not that the suits arise from the same cause of action, but that they raise

the same issue(s). A finding of issue preclusion, in contrast to claim preclusion, operates to bar merely the previously litigated issue, and not the entire claim. "Once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a later suit on a different cause of action involving a party to the first case." *Allen*, 449 U.S. at 94. Collateral estoppel or issue preclusion does not apply unless: (1) the issue at stake is identical to an issue in the prior litigation; (2) the issue in the prior litigation was actually litigated; (3) the determination of the issue in the prior litigation was essential to final judgment; and (4) the party precluded from relitigating the issue was represented in the prior litigation. *La Preferida, Inc. v. Cerveceria Modelo, S.A. de C.V.*, 914 F.2d 900, 906 (7th Cir. 1990) (citing *Klingman v. Levinson*, 831 F.2d 1292, 1295 (7th Cir. 1987); *Gray v. Lacke*, 885 F.2d 399, 406 (7th Cir. 1989), *cert. denied*, 494 U.S. 1029 (1990).

Before barring an action, both claim and issue preclusion require the court to find an "identity of parties" or privities. This requirement guarantees that the litigants have an adequate opportunity to be heard. *Rush v. Superintendent of Police*, 93 C 1675, 1994 WL 114847 *4 (N.D. Ill., Apr. 4, 1994). "Concepts summarized by the term privity are looked to as a means of determining whether the interests of the party against whom claim preclusion is asserted were represented in the prior litigation." *Chase Manhattan Bank, N.A. v. Celotex Corp.*, 56 F.3d 343, 346 (2d Cir. 1995). Although privity is an elusive concept, *L & S Industries, Inc. v. Williams*, 989 F.2d 929, 932 (7th Cir. 1993), it generally denotes a relationship that is sufficiently close to justify issue or claim preclusion, *First Options of Chicago, Inc. v. Kaplan*,

913 F. Supp. 377, 383 (E.D. Pa 1996). "Privity between parties is established where those parties' interests are so closely aligned that they represent the same legal interests." *In re Chicago Police Officer Promotions*, No. 91 C 668, 1991 WL 134218, *5 (N.D. Ill. July 16, 1991) (quoting *Secretary of Labor v. Fitzsimmons*, 805 F.2d 682, 688 & n.9 (7th Cir. 1986)). Thus, nonparties may satisfy the "identity of parties" requirement and, if so, the prior action will preclude them. *See People Who Care v. Rockford Bd. of Educ.*, 68 F.3d 172, 177 (7th Cir. 1995) ("[T]he preclusive effects of judgments have been expanded to apply to nonparties, and *res judicata* can sometimes operate to bar the maintenance of an action by persons who were . . . not parties to the initial action." (citations omitted)).

The doctrine of virtual representation enables courts to find privity between parties.[8] Even if a person was not named in the prior judgment, he may be bound if one of the parties

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8. Plaintiffs argue that "it is far from clear whether [the doctrine of virtual representation] necessarily applies . . . in this circuit." (Pls.' Resp. at 10.) To the contrary, however, in *EEOC v. Harris Chernin, Inc.*, 767 F. Supp. 919 (N.D. Ill. 1991), an ADEA action, the district court found that privity existed between the plaintiff and the EEOC via the doctrine of virtual representation. Furthermore, on appeal, without using the term "virtual representation," the Seventh Circuit court of appeals affirmed the lower court's findings on virtual representation. *See EEOC v. Harris Chernin, Inc.*, 10 F.3d 1286, 1291 (7th Cir. 1993). Additionally, a number of courts from the Northern District of Illinois apply this doctrine. *See In re Chicago Police Officer Promotions*, No. 91 C 668, 1991 WL 134218 (N.D. Ill., July 16, 1991); *Maguire v. Selke*, No. 90 C 21, 1990 WL 70451 (N.D. Ill., May 4, 1990); *Hartke v. Chicago Bd. of Election Commissioners*, 651 F. Supp. 86 (N.D. Ill. 1986).

to the suit was so "closely aligned with his interests as to be his virtual representative." *Id.* (citation omitted); *See also L & S Industries, Inc.*, 989 F.2d 929 (citation omitted). "[I]f he is so closely aligned with . . . the parties . . ., then his concerns have certainly received adequate representation." *See People Who Care*, 68 F.3d at 177. The party in the original action, however, "must have had 'every reason to prosecute or defend the case as vigorously' as the party to the subsequent suit." *Rush*, 1994 WL 114847, *4 (citing *Petit v. City of Chicago*, 766 F. Supp. 607 (N.D. Ill. 1991)). Virtual representation may be used to determine whether two parties are in privity for purposes of either issue or claim preclusion.

In this case the court can apply either res judicata [claim preclusion] or collateral estoppel [issue preclusion], because the parties have combined these two concepts. The court will only address the case for preclusion by res judicata [claim preclusion] — the more preclusive of the two doctrines. Claim preclusion's standard is more stringent because it bars not only the previously litigated issues, but all claims based on the prior cause of action. *See Montana*, 440 U.S. at 153; *See also Harris Chernin, Inc.*, 10 F.3d at 1290 n.5 (quoting in dicta a Seventh Circuit case which held that a "relaxed concept of finality is acceptable for issue preclusion, and clearly implie[d] that it is not acceptable for claim preclusion." (citation omitted)). Furthermore, it is clear that the issue involved in this case, whether American violated the ADEA, is identical to the issue addressed in *Johnson*. Collateral estoppel's requirement of identical issues is its only departure from the res judicata standard. Thus, if the other two res judicata elements are established, issue preclusion will also apply to this case. *See also Hartke*, 651 F. Supp. at 88.

Appendix B

I. Final Judgment on the Merits

The final judgment in the *Johnson* litigation satisfies the first requirement of res judicata. "The 'merits' of an adjudication pertains to the substantive rights of the parties." *Hartke*, 651 F. Supp. at 88. *Johnson* was a jury trial in which twenty ex-captains seeking to downbid to the flight officer position sued American for violating the ADEA. *Johnson*, 745 F.2d at 990. The jury in *Johnson* returned a verdict for American upon finding that it had a valid ADEA defense to the plaintiffs' claim. *See id.* Subsequently, the plaintiffs appealed and the Fifth Circuit, affirming the lower court, held that "American's reasons for its policy [of not employing pilots in the flight officer position after their sixtieth birthdays] qualify as a BFOQ defense." *Id.* at 993; *See also Hartke*, 651 F. Supp. at 89 ("The affirmance of that decision . . . renders that decision final as well on the merits.") Thus, the substantive rights of the *Johnson* plaintiffs under the ADEA were addressed and finally determined.

II. Identity of the Causes of Action

The *Johnson* litigation and the ADEA claim presently before the court also satisfy the second requirement of identical causes of action. A cause of action consists of a single core of operative facts which gives the plaintiff a right to seek redress for the wrong concerned. *Brzostowski*, 49 F.3d at 339 (citing *Colonial Penn Life Ins. Co. v. Hallmark Ins. Admin., Inc.*, 31 F.3d 445, 447 (7th Cir. 1994)). "Two claims are one for the purposes of res judicata if they are based on the same, or nearly the same, factual allegations." *Id.*; *See also People Who Care*, 68 F.3d at 177-78 (the "cause of action

must be based on the same facts and raise the same issues as the cause of action in [the prior suit].") For instance, in *Brzostowski*, the Seventh Circuit, affirming the district court, held that the firing of the plaintiff gave rise to both suits and constituted the nucleus of factual allegations, because the resolution of both complaints revolved around whether the defendant complied with its legal obligations. *Brzostowski*, 49 F.3d at 339.

Additionally, when the court determines whether two causes of action are identical for res judicata purposes, the fact that the plaintiffs' legal theories in each case are formulated somewhat differently does not detract from the identity of the causes of action. *Hartke*, 651 F. Supp. at 89. "If the same facts are essential to the maintenance of both proceedings or the same evidence is needed to sustain both, then there is identity between allegedly different causes of action. . . ." *Id. See also Maguire*, 1990 WL 70451, *3 ("[C]ourts . . . must look beyond the legal theory expressed in the complaint and focus on the facts surrounding the claim and the injury inflicted upon the plaintiff.")

The court finds that plaintiffs' ADEA claim clearly arises out of the same core of operative facts and is based on the same factual allegations as the *Johnson* claim. First, both claims arose out of American's policy of denying their sixty-year-old captains' requests to downbid to the flight officer position. This so-called "forced retirement" is the nucleus of factual allegations giving rise to both claims. Additionally, the legal elements of the two claims are identical. The resolution of both complaints necessarily involves deciding whether American's actions violated the

ADEA. In other words, both cases ask whether American complied with its legal obligations arising from the ADEA when it refused its sixty-year-old pilots' requests. *See also Maguire*, 1990 WL 70451, *3 (identity of causes of action found where plaintiffs attempted to challenge, in federal court, the same statute — the promulgation of which was the core of operative fact — on the identical legal theories as plaintiffs in a prior action); *Hartke*, 651 F. Supp. at 89 (identity of causes of action found where the single core of operative fact was the election board's refusal to put a referendum on the ballot — although the plaintiffs' legal theories differed).

Plaintiffs unpersuasively argue that the two cases do not encompass the same cause of action. (Pls.' Resp. at 9.) Plaintiffs focus on the Fifth Circuit's *holding* in *Johnson* to support their argument, rather than focusing on the "nucleus of factual allegations giving rise to both suits." *See Brzostowski*, 49 F.3d at 339; (Pls. Resp. at 9.) However, the prior court's holding, the legal conclusion it rendered after considering the cause of action and plaintiffs' claim, was not the cause of action. Rather, the cause of action was the event that propelled the plaintiffs into court. The court determines the cause of action by looking to and comparing the facts *giving rise* to the claims, not the prior holding. *See Brzostowski*, 49 F.3d at 339. Here, the cause of action that propelled the plaintiffs' into court, as stated above, was American's refusal to downbid them, which was identical to the cause of action in *Johnson*. Thus, plaintiffs' argument is meritless.

III. Identity of the Parties or Privies

Finally, there must be an identity of parties or privies in the two actions for the court to invoke the doctrine of res judicata.[9] Whether plaintiffs were adequately represented in the *Johnson* action presents a more difficult question. Plaintiffs were not formal parties to the *Johnson* action. Thus, privity must exist via virtual representation. The cases applying virtual representation, however, do not set forth any express analytical framework. *Maguire v. Selke*, No. 90 C 21, 1990 WL 70451, *4 (N.D. Ill., May 7, 1990). Rather, this district's prior decisions in this area guide the court.

In *In re Chicago Police Officer Promotions*, No. 91 C 668, 1991 WL 134218 (N.D. Ill. July, 16, 1991), the district court for the Northern District of Illinois, applying the doctrine of virtual representation, found "sufficient privity . . . such that the doctrine of res judicata may be considered." This case involved the question of whether 200 plaintiffs were in privity with the plaintiffs of a potentially preclusive, prior suit. *See id.* at *5. Applying the doctrine of virtual representation, the court, persuaded by a number of factors,

---

9. American argues that, in addition to *Johnson*, *Murnane*, 482 F. Supp 135, and *EEOC*, 48 F.3d 164, preclude plaintiffs' claim. The court, however, disagrees. The plaintiffs in those cases were pilots over age 40 who applied for and were denied employment as third-seat flight officers. *See EEOC*, 48 F.3d 164; *Murnane*, 482 F. Supp. 135. In comparison, the plaintiffs in *Johnson* and the case at bar were former American pilots over sixty who wished to downbid to the position of flight officer — American had already employed them. This distinction is significant, and, as a result, the third res judicata element is not met with regard to these two cases.

found an identity of privity between all of the plaintiffs. *See id.* at *6. First, the court found that the legal and factual issues in the case at bar were identical to the prior case. *See id.* Next, the court found the present plaintiffs were adequately represented in the prior litigation, due to the fact that they had retained the same counsel as the prior plaintiffs. *See id.* Additionally, the court noted that the present plaintiffs maneuvered to try and avoid the prior litigation's preclusive effects. *See id.* The court also found that all of the plaintiffs' legal interests were congruent. *See id*; *See also Maguire*, 1990 WL 70451, at *5 (two sets of plaintiffs who were in the same occupation and sought to challenge the application of the same statutory regulation to their occupation were in privity via virtual representation); *Rush*, 1994 WL 114847, at * 4; *Hartke*, 651 F. Supp. at 86.

Applying the virtual representation doctrine, the court finds that the legal and factual issues in this case are identical to those litigated in *Johnson*. Additionally, as in *In re Chicago Police Officer Promotions*, the same attorney representing the present plaintiffs, represented the *Johnson* plaintiffs. Consequently, the attorney had "every reason to prosecute or defend the [prior] case as vigorously" as in the present party's suit. *Rush*, 1994 WL 114847, *4 (citing *Petit v. City of Chicago*, 766 F. Supp. 607 (N.D. Ill. 1991)). Therefore, counsel adequately protected the interests of plaintiffs by vigorously prosecuting the *Johnson* plaintiffs' interests.

Furthermore, plaintiffs maneuvered to avoid the preclusive effects of *Johnson* by arguing that "[p]laintiffs' complaint in this case does not address defendant's alleged 'future captain' policy but, instead, opposes defendant's

refusal to employ them after their sixtieth birthday." (Pls.' Resp. at 8.) Plaintiffs' attempt to differentiate the policies at issue, however, is unpersuasive because denying pilots employment as flight officers after their sixtieth birthday is tied to American's "future captain" (or "up-and-out") policy. Also, plaintiffs' legal interests are congruent with the *Johnson* plaintiffs; plaintiffs, like the *Johnson* plaintiffs, want the court to conclude that American's actions violated the ADEA. The court's finding of privity, additionally, comports with the policies of res judicata: to preclude parties from contesting a matter that they had a full and fair opportunity to litigate. *Montana*, 440 U.S. at 153. Lastly, had the *Johnson* plaintiffs succeeded on the merits, plaintiffs would have benefitted, American could not refuse retiring captains' downbid requests, and this matter would not be before the court.

Therefore, the court, drawing all inferences in favor of plaintiffs, concludes that plaintiffs were virtually represented by the *Johnson* plaintiffs. Plaintiffs in both cases are retired American Airline captains who, at different points in time, American refused to downbid. Thus, plaintiffs are in privity with the *Johnson* plaintiffs. *See, e.g.*, *Maguire*, 1990 WL 70451, at *5 (privity found between plaintiffs in both cases who practiced naprapathy without a degree, and were prohibited from plying their trade by the enactment of a statute); *Hartke*, 651 F. Supp. at 91 (privity found between plaintiffs, despite the fact that the plaintiffs had no input or connection to prior litigation, where they had the same cause of action and sought the same remedy).

Consequently, plaintiffs suit is identical to the *Johnson* suit with regard to the parties and cause of action, thus their

entire claim is precluded. "A fundamental precept of common-law adjudication . . . is that a 'right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit between the same parties or their privies . . . .' " *Montana*, 440 U.S. at 153 (1979) (citations omitted). The right put in issue by the *Johnson* plaintiffs, and directly determined at both the trial and appellate levels, cannot be relitigated. Thus, the Fifth Circuit's holding in *Johnson* that American's refusal to downbid sixty-year-old, retiring pilots is a bona fide occupational qualification excepted from the ADEA's requirements disposes of the claim before this court.

In sum, plaintiffs fail to state a claim for which relief can be granted. The court reaches this decision considering only the facts alleged in the complaint. After the examination of the facts in a light most favorable to plaintiffs, the court views the claim in he complaint as indistinguishable from the claim fully litigated in *Johnson*. Thus, the doctrine of res judicata applies and judgment on the pleadings in favor of American is appropriate. Furthermore, the court's decision avoids "the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *Montana*, 440 U.S. at 153-154. In light of the reasons stated above, the court grants American's motion for judgment on the pleadings.

Appendix B

Conclusion

For reasons set forth above, the court grants American's motion for judgment on the pleadings.

ENTER:

s/ Ann Claire Williams
Ann Claire Williams, Judge
United States District Court

Dated: MAR 31 1997

APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DATED MARCH 31, 1997

United States District Court
NORTHERN DISTRICT OF ILLINOIS
Eastern Division

CASE NUMBER: 95 C 6890

ROBERT H. TICE, et al.,

v.

AMERICAN AIRLINES, INC.

JUDGMENT IN A CIVIL CASE

* * *

☒ Decision by Court. This action came to a hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that pursuant to the court's memorandum opinion and order entered March 31, 1997, the court grants American's motion for judgment on the pleadings; that judgment on the pleadings is entered in favor of defendant and against plaintiffs; that plaintiffs take nothing and this case is dismissed on the merits.

March 31, 1997
Date

Michael W. Dobbins
Clerk

s/ [illegible]
(By) Deputy Clerk

APPENDIX D — MINUTE ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS DATED MARCH 31, 1997

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Michael W. Dobbins
CLERK

Office of the Clerk

Terence G. Connor
Morgan, Lewis & Bockius
5300 First Union Financial Center
200 South Biscayne Boulevard
Miami, FL 33131-2339

Case Number: 1:95-cv-06890

Title: Tice v. Amer AL Inc

Assigned Judge: Honorable Ann C. Williams

MINUTE ORDER of 3/31/97 by Hon. Ann C. Williams : Pursuant to memorandum opinion and order, the court grants American's motion for judgment on the pleadings [49-1] terminating case Mailed notice

This docket entry was made by the Clerk on March 31, 1997

Appendix D

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by ICMS, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

APPENDIX E — MINUTE ORDER FORM DATED MARCH 31, 1997

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS

Name of Assigned Judge
or Magistrate Judge ANN C. WILLIAMS

* * *

Case Number 95 C 6890 Date MARCH 31, 1997

Case Title TICE v. AMERICAN AIRLINES

* * *

DOCKET ENTRY:

* * *

(10) ☒ [Other docket entry] Pursuant to memorandum opinion and order, the court grants American's motion for judgment on the pleadings.

(11) ☒ [For further detail see

* * *

☒ order attached to the original minute order form.]

* * *

Appendix E

☒ Docketing to mail notices.

☒ Mail AO 450 form

* * *

s/ DJ courtroom
deputy
initials

* * *

APPENDIX F — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED JANUARY 26, 1999

United States Court of Appeals
for the Seventh Circuit
Chicago, Illinois 60604

Decided January 26, 1999

Before

Hon. JOHN L. COFFEY, *Circuit Judge*
Hon. JOEL M. FLAUM, *Circuit Judge*
Hon. DIANE P. WOOD, *Circuit Judge*

Nos. 97-1888 & 97-2027

ROBERT H. TICE, *et al.*,

Plaintiffs-Appellants,
Cross-Appellees,

v.

AMERICAN AIRLINES, INC.,

Defendant-Appellee,
Cross-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 95 C 6890

Ann Claire Williams, *Judge.*

Appendix F

ORDER

On consideration of the petition for rehearing with suggestion for rehearing *en banc* filed by counsel for the Defendant-Appellee/Cross-Appellant American Airlines, Inc. on December 31, 1998, all members of the original panel have voted to **DENY** the petition for rehearing. No judge in regular active service has requested a vote on the suggestion for rehearing *en banc*. Accordingly,

IT IS ORDERED that the petition for rehearing with suggestion for rehearing *en banc* be, and the same is hereby, **DENIED.**

Supreme Court, U.S.
FILED
MAY 21 1999
CLERK

No. 98-1704

In The

Supreme Court of the United States

AMERICAN AIRLINES, INC.,

Petitioner,

v.

ROBERT H. TICE, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the court below correctly determine that an employee is entitled to his own day in court under the Age Discrimination in Employment Act, when:

1. other entirely unrelated employees sued the same employer unsuccessfully 16 years previously in a case raising a similar issue involving job transfer and mandatory retirement; and

2. the Equal Employment Opportunity Commission sued the employer previously on behalf of job applicants in cases raising a different issue involving hiring age limitations?

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STATEMENT OF THE CASE

A. Factual Background

Robert H. Tice and eleven airline pilot colleagues brought this age discrimination action in 1995 against the petitioner, American Airlines, Inc., after the company refused to allow them to "downbid" to the cockpit position of flight engineer (called "flight officer") and forced them to retire following their sixtieth birthdays. The plaintiffs wanted to continue their employment after age 60 as flight engineers, which is permitted by the Federal Aviation Administration and by all domestic airlines except American. *See Western Airlines, Inc. v. Criswell*, 472 U.S. 400, 422-23 (1985) (age 60 is not a bona fide occupational qualification ("BFOQ") for flight engineers).

American filed its answer asserting, among other things, that this action was precluded under the doctrines of res judicata and/or collateral estoppel based on the decisions in *Johnson, et al. v. American Airlines, Inc.*, 745 F.2d 988 (5th Cir. 1984), *cert. denied*, 472 U.S. 1027 (1985); *Murnane v. American Airlines, Inc.*, 667 F.2d 98 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 915 (1982); and *EEOC v. American Airlines, Inc.*, 48 F.3d 164 (5th Cir. 1995).

The *Johnson* litigation was filed in 1979 and 1980 by a group of airline pilots (not including the plaintiffs here) who sought to continue their employment past age 60. *Johnson* was not a class action, and all plaintiffs filed their written consents to join the litigation. At that time, petitioner opposed the joinder of plaintiffs under age 60 on the ground that they "lack standing" and that their potential claims would not be affected by a judgment. *Johnson v. American Airlines, Inc.*, 531 F. Supp. 957, 964

(N.D. Texas 1982). The *Johnson* court found sufficient evidence to support a jury verdict that age (60) was a BFOQ for flight engineers "reasonably necessary to the normal operation" of the petitioner's business. 29 U.S.C. § 623(f)(1). *Johnson*, 745 F.2d at 994.

Contrary to petitioner's representation, *Murnane* and *EEOC* involved different plaintiffs and a different issue entirely. Edward Murnane applied for a pilot job and was rejected because of his age (43) pursuant to American's policy not to hire pilots over age 40. The Equal Employment Opportunity Commission ("EEOC") (successor to the U.S. Department of Labor) intervened as a plaintiff, and the court upheld petitioner's "age forty [hiring age] guideline." *Murnane*, 667 F.2d at 101. Later, the EEOC brought a second action challenging petitioner's hiring age limit, but the court concluded that the case was collaterally estopped by *Murnane*. *EEOC*, 48 F.3d at 166-172. The Tice plaintiffs were not parties and did not participate in *Johnson*, *Murnane*, or *EEOC*.

B. The Trial Court's Decision

The trial court dismissed the complaint based on the view that the *Johnson* plaintiffs "virtually represented" the plaintiffs here when the earlier group litigated their claims in 1979. Pet. App. 35a. At the same time, the trial court rejected American's argument that *Murnane* and *EEOC* had preclusive effect, determining that the plaintiffs in those cases were "pilots over age 40 who applied for and were denied employment," whereas the plaintiffs here are "former American pilots over sixty who wished

to downbid to the position. . . . " This distinction is "significant," the court determined. Pet. App. 33a, n.9.

C. The Court Of Appeals' Decision

The Court of Appeals reversed. It concluded that, as the EEOC pointed out in its amicus brief, the rights plaintiffs seek to vindicate are individual, not group-based. The Age Discrimination in Employment Act ("ADEA") provides that "[n]o employee shall be a party plaintiff to any . . . action [under it] unless he gives his consent in writing. . . . " 29 U.S.C. § 216(b) (section 16(b) of the Fair Labor Standards Act ("FLSA"), incorporated into the ADEA by 29 U.S.C. § 626(b)). The Tice plaintiffs never gave their "consent in writing" to join any of the earlier cases upon which American relied. The court observed that ADEA group actions like *Johnson* are "opt-in" rather than "opt-out," as a result of the FLSA's "consent in writing" requirement, and thus they differ importantly from the class actions available under Rule 23. The additional protections of this system, compared to Rule 23 "opt-out" class actions, would be eviscerated were the Tice plaintiffs to be viewed as having been in privity with the earlier plaintiffs. Pet. App. 15a.

In addition, the court concluded that there were "too many" differences between the plaintiffs here and those in the earlier cases to make preclusion appropriate. Pet. App. 15a. There was no evidence of any relationship between the *Johnson* and Tice plaintiffs. On the contrary, the interests of the *Johnson* plaintiffs in 1979 diverged from the interests of younger American employees (including the Tice plaintiffs, then in their early 40s),

"since the younger pilots might well have wanted their elders forced out [at age 60], freeing up more positions for themselves." *Id.*

The court found no evidence of manipulative litigation practices, and it specifically rejected petitioner's suggestion that the plaintiffs' decision to retain one of the same attorneys as in *Johnson* amounted to an improper practice. Pet. App. 15a-16a. The court noted that the plaintiffs did not and could not have taken part in any of the earlier challenges to petitioner's age limitation policies, nor did they acquiesce to being represented indirectly by those plaintiffs.

The Seventh Circuit emphasized this Court's continuing solicitude for each person's right to pursue his or her own case, citing *Richards v. Jefferson County, Alabama*, 517 U.S. 793 (1996), and concluded that to bar this action would "strain preclusion principles." Pet. App. 16a. Finally, the court concluded, in agreement with the district court, that the EEOC did not serve as the Tice plaintiffs' representative in *Murnane* and *EEOC, supra*. The EEOC participated in *Murnane* to enforce Murnane's individual rights, and it filed the later case to enforce the rights of 57 specifically named applicants for employment, none of whom is a plaintiff here. *See* 29 U.S.C. § 626(c)(1). The EEOC could not have represented the interests of the Tice plaintiffs "because the class of persons complaining that they were not hired because of American's age policies is inherently different from the class of existing employees" complaining about mandatory retirement. "What helps the one may directly hurt the other." Pet. App. 15a. EEOC's status as a public body did not change the court's analyses under the rubric of

virtual representation or privity, and the court noted that in *Richards* this Court had rejected a similar argument. Pet. App. 16a-17a.

REASONS TO DENY THE WRIT

The petition seeks this Court's review of the Seventh Circuit's judgment that this case may proceed because plaintiffs were not "virtually represented" in prior litigation. The statute under which this case arose bars preclusion because plaintiffs cannot be represented by others without the plaintiffs' written consent. Moreover, the Seventh Circuit's determination that "virtual representation" does not apply to bar plaintiffs' claims is based on the unique facts of this case, including the fact that plaintiffs were complete strangers to the earlier litigation. Pet. App. 16a. Review should also be denied of the determination that this case is not precluded by EEOC actions involving fundamentally different issues brought on behalf of different employees.

There is no conflict between the decision below and the decision of any Court of Appeals. Despite petitioner's mischaracterization of the issues, the facts, the decision below, and decisions from other circuits, the court below correctly analyzed the material facts and the applicable law. Under this Court's decision in *Richards*, plaintiffs are entitled to their day in court.

1. The Decision Below Is Consistent With The Statutes Under Which This Action Was Filed.

There is no decision of any court arising under the ADEA or FLSA that is in conflict with the decision below. The Seventh Circuit correctly interpreted and applied the provisions of the ADEA, and petitioner does not challenge or even address the court's dispositive determination under the statute. 29 U.S.C. § 216(b).

Contrary to petitioner's argument that the opinion below is in conflict with the law in other circuits, the decision rejecting the application of virtual representation turned on the unique facts in this litigation, including the statutory framework and the absence of any relationship between the plaintiffs here and those in prior cases. The ADEA's special statutory provisions foreclose petitioner's proposed expansive application of virtual representation. Under the ADEA, a party who wishes to participate as a plaintiff in litigation must file a "written consent" to do so. 29 U.S.C. § 216(b). Those who do not "consent" may not participate in or be bound by the judgment. *LaChappelle v. Owens-Illinois, Inc.*, 513 F.2d 286, 287-88, 289 (5th Cir. 1975) (no person will be bound by or may benefit from judgment unless he has affirmatively "opted into" the class by filing his written consent). Therefore, under the language of the statute itself, the plaintiffs here could not be bound or precluded by *Johnson*, *Murnane*, or *EEOC*. This is so because the plaintiffs here did not consent to join those cases and the EEOC did not file suit "to enforce the right" of any of the Tice plaintiffs. 29 U.S.C. § 626(c)(1). This Court should not grant review because

the court below correctly interpreted the controlling statutes, and because no other court has decided the issues differently.

2. The Law In The Seventh Circuit Is Not In Conflict With Other Circuits.

Contrary to petitioner's claim that the Seventh Circuit takes a "highly restrictive view of privity and virtual representation" (Pet. 10), six days after the decision below, the court applied virtual representation in *Monfils v. Taylor*, 165 F.3d 511 (1998). The court determined that the application of the doctrine was appropriate because the plaintiff had actively litigated his personal defenses in a prior case. *Id.* at 519-21. The *Monfils* court distinguished the decision in *Tice* as involving "different parties in a completely different case," whereas in *Monfils* there was a pre-existing relationship between the prior and current litigants such that their "interests were in privity." *Id.* at 521.

In support of its claim that the decision below is in conflict with the law of other courts, American relies principally on *Tyus v. Schoemehl*, 93 F.3d 449 (8th Cir. 1996). *Tyus* was a voting rights case, so it did not involve the ADEA's special statutory "opt-in" scheme. Moreover, *Tyus* involved the issue whether collateral estoppel applied to bar an action in which aldermen plaintiffs had previously sued and lost, and then joined with others to file another identical case. In holding that the new plaintiffs were in privity with the aldermen, the court was influenced by several factors, none of which is present here: First, there was a "special relationship" between the

plaintiffs, several of whom had already once litigated the case. Stretching to find such a relationship here, petitioner argues that the plaintiffs are members of the same union as the *Johnson* plaintiffs, but there was no record here or in *Johnson* as to union membership status. Moreover, there is no authority to support the proposition that an action by individual employees on their own behalf bars a later plaintiff's claim simply because he is a member of the same union. As the court below found, *Johnson* was filed sixteen years before this case and "there are too many differences between the Tice plaintiffs and the plaintiffs in the earlier cases to make preclusion appropriate." Pet. App. 15a. For one thing, in 1979 the plaintiffs here may well have been hostile to Johnson's claims. *Id.* Thus, the "special relationship" between the *Tyus* plaintiffs and those in the case which preceded it did not exist in this case. As the *Tyus* court concluded in language applicable here, where "the two parties are strangers to each other, then virtual representation would not be appropriate." 93 F.3d at 455.

Second, the *Tyus* court determined that there had been blatant tactical maneuvering to avoid the force of the prior decision when the original plaintiffs sought to withdraw from the first case and then join with nonparties to file a second action. *Id.* at 457. No such factors are present here. In fact, when the *Johnson* plaintiffs were assembled pursuant to a court-approved notice in the early 1980s, the Tice plaintiffs did not receive notice and were among those who were barred from participation because their sixtieth birthdays were after December 31, 1984, the cut-off date established by the court. *Johnson*, 531 F. Supp. at 964-65. At that time, petitioner asserted

that pilots under age 60 "lack standing" because they had not yet been forced to retire and thus their potential claims would not be affected by a judgment in *Johnson*. *Id.*

Third, the *Tyus* court determined that virtual representation was "particularly appropriate for public law issues," and that any due process concerns were lessened in a case in which plaintiffs seek to vindicate only public rights. 93 F.3d at 456. Unlike the *Johnson* plaintiffs, who sued for personal damages and to regain their employment, the *Tyus* plaintiffs and those in the earlier action raised no issues involving individual rights. *Id.* If the *Johnson* plaintiffs had prevailed, the court would have ordered individual damages and may or may not have entered a remedial order ultimately benefiting other pilots. In *Tyus*, the plaintiffs did not allege that they had a different private right not shared in common with the public. *Id.* at 457.

The other cases cited by American are also inapposite. In *Aerojet-General Corp. v. Askew*, 511 F.2d 710, 720 (5th Cir.), *reh. denied*, 514 F.2d 1072, *cert. denied*, 423 U.S. 908 (1975) (Pet. 9, 18), a county was precluded by a prior action because it had a "class relationship to the parties." *But see Eubanks v. Federal Deposit Insurance Corp.*, 977 F.2d 166, 170 (5th Cir. 1992), in which the Fifth Circuit later concluded that parallel interests with a prior litigant are insufficient to invoke the doctrine of "virtual representation." Even where there is an "identity of claims," the court held res judicata does not bar a second action unless plaintiff could or should have brought its claim in the prior case. *Id.* at 173. *See also Chase Manhattan N.A. v. Celotex Corp.*, 56 F.3d 343 (2d Cir. 1995) (Pet. 13) (virtual representation did not apply because prior litigant's

incentives were not the same); *Los Angeles Branch NAACP v. Los Angeles Unified School District*, 750 F.2d 731, 745 (9th Cir. 1984), *cert. denied*, 474 U.S. 919 (1985) (Pet. 22) (plaintiffs denied opportunity to relitigate consistent with California law since they had a previous opportunity to participate but elected against it); *NAACP v. Hunt*, 891 F.2d 1555, 1561 (11th Cir. 1990) (Pet. 13) (prior litigant who joined with NAACP to file a second case challenging flying of confederate flag barred by res judicata because he was "so closely aligned with NAACP's interests" in the original suit).

3. The Decision Below Is Consistent With This Court's Decision In *Richards*.

Petitioner fails to come to terms with the fact that the decision below is wholly consistent with, and arguably compelled by, this Court's decision in *Richards*. The Court rejected as a violation of due process the state's argument that prior litigants had provided "adequate representation." 517 U.S. at 796. The *Richards* plaintiffs were not parties to the earlier case and had not received notice that a suit was pending that would conclusively resolve their legal rights. Nor was the earlier suit brought on behalf of a class that included the later plaintiffs. As this Court noted, a litigant is not bound in a litigation in which he is not a party. A judgment among parties to a lawsuit "resolves issues as among them, but it does not conclude the right of strangers to these proceedings." 517 U.S. at 798. This rule is part of our "deep-rooted historic tradition that everyone should have his own day in court." *Martin v. Wilks*, 490 U.S. 755, 762 (1989).

This Court recently reaffirmed the principles of *Richards* in *South Central Bell Telephone Co. v. Alabama*, ___ U.S. ___, 119 S. Ct. 1180 (1999). The Court observed, in language equally applicable here, that the previous litigants had not sued on behalf of a class, that they did not understand their case to be on behalf of others, that the judgment they received did not purport to bind nonparties, and that the Court made no special effort to protect the interests of non-litigants. In *South Central Bell*, the earlier case involved different plaintiffs and different tax years. Neither case was a "class action," and defendant made no claim that there was "privity" or some other "special relationship" between the two sets of plaintiffs. Like the Tice plaintiffs, the plaintiffs in *South Central Bell* were "strangers" to the earlier case and therefore could not be bound by the earlier judgment. *Id.* at 1185.

The facts here are even stronger for rejecting preclusion than the facts in *South Central Bell* since, unlike here, the plaintiffs in *South Central Bell* were aware of the earlier litigation. The Court rejected the argument that prior "notice," plus the same lawyer in both cases, were sufficient to meet due process requirements. These circumstances "created no special representational relationship" between the two sets of plaintiffs. *Id.* The Seventh Circuit's decision below is totally consistent with this Court's decisions in *Richards* and *South Central Bell*.

4. The Government Did Not Represent The Tice Plaintiffs' Interests In *Murnane* And *EEOC*.

Petitioner argues that this case is barred by the EEOC's involvement in *Murnane* and *EEOC*, and that the circuits disagree as to the preclusive effect of a decision against a public entity. In fact, there is no case arising under the ADEA or FLSA which is in conflict with the decision below. Like petitioner's earlier argument about the preclusive effect of *Johnson*, the claim that this case is barred by prior EEOC litigation about petitioner's hiring age limitation is foreclosed by both the substantially different facts involved and the language of the statute itself.

Murnane and *EEOC* involved different parties, different issues, and different facts. The issue in *Murnane* was whether American's age-below-40 hiring policy was a bona fide occupational qualification. The issue in *EEOC* was whether *Murnane* precluded the EEOC's later action under the doctrine of collateral estoppel. Plaintiffs in those cases had no need or occasion to present the evidence and arguments the plaintiffs here would present. The safety of an experienced pilot with impeccable qualifications to downbid and continue his employment as a flight engineer after age 60 is a considerably different issue from one involving the safety of relatively inexperienced new-hire applicants over age 40.

Like petitioner's arguments for preclusion in reliance on *Johnson*, its position is again defeated by the statute. The ADEA provides that an action brought by an employee "shall terminate upon the commencement of an action by the [EEOC] *to enforce the right of such employee*

under this chapter." 29 U.S.C. § 626(c)(1) (emphasis added). Under the FLSA, an employee's right to bring an action terminates upon the filing of an action by the government to obtain unpaid wages "owing to such employee." 29 U.S.C. § 216(b). As explained in *EEOC v. U.S. Steel Corp.*, 921 F.2d 489, 494-95 (3d Cir. 1990), the EEOC "serve[s] as the individual's representative when it seeks to enforce that individual's rights." An EEOC action seeking only injunctive relief does not "foreclose injured employees from joining an ongoing lawsuit which sought relief that the EEOC chose not to pursue." *American Ass'n of Retired Persons v. Farmers Group*, 943 F.2d 996, 1006 (9th Cir. 1991), *cert. denied*, 502 U.S. 1059 (1992).

As the court noted below, in *Murnane* the EEOC sought relief only for Mr. Murnane, and in *EEOC* the government specifically named 57 pilot applicants – "only those applicants who could not become captain under the years-to-Captain rule" – as the persons whose rights it was seeking to enforce. *EEOC*, 48 F.3d at 169, and n.7. The government made no mention of, and sought no relief for, any of the Tice plaintiffs in those cases.

The EEOC's actions in *Murnane* and *EEOC* challenged a different age limitation on behalf of different persons. Petitioner cites no decision of any court holding that an EEOC action on behalf of different persons and on a different issue can bar a later individual action.

Petitioner cites *In re Schimmels*, 127 F.3d 875 (9th Cir. 1997) (Pet. 13, 17), in support of its claim that the Seventh Circuit's rejection of petitioner's collateral estoppel argument is in conflict with decisions in other circuits. The *Schimmels* court held that a judgment against *qui tam*

relators in an action under the False Claims Act ("FCA") had full res judicata effect against the government. *Id.* at 879. The *Schimmels* court was influenced by these facts: (1) relator asserted that he represented the United States under the FCA, which requires notice to the government, provides that the action be brought in the name of the government, and authorizes the government to assume control of the litigation (*id.* at 879-80, n.13); (2) under the FCA, an action may be brought by a private party only with authorization of the responsible public authority; (3) the government admitted that it was in privity with the relators for some purposes; (4) the government was aware of the relators' case and even tacitly participated in it but never sought to intervene; and (5) in a *qui tam* action, the government is the "real party in interest," even when it permits a *qui tam* relator to pursue the action on its behalf. *Id.* at 883-85.

In conclusion, the court found that the private right of recovery created by the FCA exists not to compensate the relator, but the United States. *Id.* at 883. It held that the relator and the government were in privity and that the dismissal of relator's claim had preclusive effect on the government. *Id.* at 883, 885. The decision in *In re Schimmels* is not even remotely in conflict with the decision below.

The other cases cited by petitioner are similarly inapposite. In *United States v. ITT Rayonier, Inc.*, 627 F.2d 996 (9th Cir. 1980) (Pet. 12, 17, 18), the court determined that the government was bound by a prior case prosecuted by a state agency because the state's authority was derived from federal law and revocable by a federal agency. Since there was a legal relationship between the two agency

"partners," a judgment against the state had preclusive effect against the federal government. *Id.* at 1001-4. The court emphasized that the state agency was accountable to the United States, and that both acted to "enforce the same permit." *Id.* at 1003. Under these circumstances, the two were in privity because the state had the authority to represent the interests of the United States. *See also Berman v. Denver Tramway Corp.*, 197 F.2d 946 (10th Cir. 1952) (Pet. 16) (municipality's authority to establish fares is binding on the public). These decisions are not inconsistent with the decision below.

5. Petitioner's Remaining Arguments Are Meritless.

Petitioner argues that once an employee protests forced retirement at age 60, no other employee should ever be permitted to do so, and that the 1979 *Johnson* action bars all pilots in perpetuity – even those not yet hired – from challenging their own forced retirement. If that were to be the law, employees like Robert Tice, who had no opportunity to participate in 1979, never would have the opportunity to prove that the "safety" rationale petitioner advanced twenty years ago has no continuing validity due to recent industry experience, scientific and medical advances, and the many new facts which have come to light that totally undercut the policy's stated rationale. Plaintiffs must be allowed their own day in court.

Having demonstrated no conflict with the decision of any other court of appeals or with any decision of this Court, and having presented no compelling issue that needs resolution by this Court, petitioner resorts to

hyperbole to convince the Court to grant review. For example, petitioner argues that it could be "forced by economics" to abandon its policy because it might be "too burdensome to defend." Pet. 22-23. Petitioner argues that a virtually unlimited supply of plaintiffs might "fence sit," but it does not suggest that plaintiffs did so here. Petitioner asserts – in an argument so baseless that it was never advanced in the courts below – that "plaintiffs, and their counsel, chose to litigate in Illinois because their claim could not survive motions to dismiss in Texas or in the District of Columbia." Pet. 24. In fact, the only "forum shopping" in this case was petitioner's repeated unsuccessful attempts to transfer the case to its headquarters district in Texas.

Petitioner claims that the decision below will cause this litigation to have "an endless life" in a "war of attrition" in which plaintiffs will employ a "strategy aimed at exacting settlements." Pet. 22. What petitioner is really complaining about are the FLSA statutory provisions which were adopted primarily to protect employers against "class" or "representative" actions, the very provisions petitioner relied on to oppose the joinder of additional plaintiffs in *Johnson*. Yet, in the 35 years petitioner claims its age 60 mandatory retirement policy has been in force, and despite the fact that aggrieved employees have had the right to file their own actions, this case is only the second employee action to challenge forced retirement. Petitioner's claim that it has been "harass[ed] from successive and repetitive challenges" (Pet. 25) has no basis in fact.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

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No. 98-1704

In the
Supreme Court of the United States

AMERICAN AIRLINES, INC.

Petitioner,

v.

ROBERT H. TICE, ET AL.

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

American Airlines, Inc. ("American") petitions this Court to grant certiorari to address the conflicting legal standards applied to issue and claim preclusion in the Federal Circuits, especially with respect to repetitive litigation by related, identically situated plaintiffs. Respondents fail to rebut American's showing that there is a significant conflict in the courts of appeals with respect to preclusion that should be resolved by this Court.

I. THE OPPOSITION IGNORES THE CONFLICTING LEGAL STANDARDS EMPLOYED BY THE FEDERAL CIRCUITS TO DETERMINE CLAIM OR ISSUE PRECLUSION.

American showed in its petition that different circuits use quite different legal tests to decide whether claim or issue preclusion is appropriate. Pet. at 10-12. For example, some circuits, including the Seventh Circuit, apply a very narrow

and restrictive test under which preclusion will *never* be found appropriate except in cases involving traditional privity or prior class certification. Pet. App. 13a. Thus, in those circuits, the doctrine of "virtual representation" is limited to circumstances involving traditional privity or a certified class.[1] Other circuits, including the Eighth Circuit, apply a much broader and less restrictive test under which preclusion *may* be found appropriate even in cases that do *not* involve traditional privity or prior class certification. *Tyus v. Schoemehl*, 93 F.3d 449, 454 (8th Cir. 1996), *cert. denied*, 520 U.S. 1166 (1997).

The opposition utterly fails to come to grips with that showing. Without even discussing the different *legal* tests used by different circuits, the opposition makes two irrelevant points in arguing that there is no conflict. First, the opposition emphasizes that the cases petitioner cites as being in conflict did not all arise under the ADEA or the FLSA. Opp. at 6. But that does not show there is no conflict. It simply shows that the conflict about how to resolve

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[1] The Seventh Circuit's decision in *Monfils v. Taylor*, 165 F.3d 511 (7th Cir. 1998) (*see* Opp. at 7) *petition for cert. filed*, 67 U.S.L.W. 3684 (U.S. Apr. 28, 1999) (No. 98-1744) is completely consistent with the narrow view of virtual representation prescribed by the Seventh Circuit in this and earlier cases. Indeed, *Monfils* expressly cited the court's earlier decision in this case with approval, noting that "the theory of 'virtual representation' has serious limitations." 165 F.3d at 521. (The limitations, as noted, are that the doctrine only applies in cases of traditional privity or prior class certification). Moreover, *Monfils* repeatedly emphasized that "Taylor [the precluded party] and the City were in privity." *Id.* *Monfils* simply reaffirmed the Seventh Circuit's view that preclusion *can* apply in cases where parties are in traditional privity. In that case, the precluded party had been a party to the underlying litigation, and the City's liability was entirely derivative of the jury's determination that the precluded party had violated the constitutional rights of the plaintiffs' decedent. *Id.* at 519. Moreover, the City was required by statute to indemnify the precluded party for any damage award against him.

preclusion issues is having an impact in a broad range of cases, not just in cases arising under the ADEA or the FLSA. Indeed, the breadth of the circumstances in which different circuits apply different preclusion tests underscores the certworthy nature of this issue.[2]

Second, the opposition argues that the different *results* in the cases petitioner cites as being in conflict can be explained by the differing and "unique" *facts* of those cases. Opp. at 7-10. But the detail that different cases involve different facts does not undercut American's showing that different circuits would use different legal tests to resolve cases involving the *same* facts. Indeed, the essence of the legal conflict between the circuits is that some circuits will only *consider* a narrow range of circumstances -- *i.e.*, whether there is traditional privity or prior class certification -- whereas other circuits will consider a much broader range of circumstances, and may decide, based on that broader range of circumstances, that preclusion is appropriate even in cases that do not involve traditional privity or prior class certification. Thus, cases not involving traditional privity or prior class

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[2] To the extent respondents' distinction between ADEA cases and other types of claims is based on their view that the ADEA itself provides a specific rule with respect to preclusion in 29 U.S.C. § 216(b), their reliance on the statute is misplaced. Section 216(b) expressly provides a right of action to employees to sue for lost wages and liquidated damages, and in that context, provides only that employees are not party plaintiffs to any such action unless they consent in writing. Thus, Congress ensured that one employee could not litigate the money damages owed to another employee without written consent. The provision does not purport to provide a preclusion rule, and does not. Nor does it limit the effect of litigation on non-party employees in any other way. The EEOC may litigate an employee's rights without consent. And any injunctive relief obtained, in an agency or private suit, governs the employment conditions of current and future employees, without their consent. *See* 29 U.S.C. § 217; *Baker v. Delta Air Lines, Inc.*, 6 F.3d 632 (9th Cir. 1993).

certification would be decided differently in different circuits, even if their facts were not distinguishable.

Accordingly, respondents have not even questioned, much less rebutted, American's showing, and the Eighth Circuit's explicit observation, that federal courts are "sharply divided" regarding the broad or narrow scope of the doctrine of virtual representation.[3] Certiorari is appropriate to resolve this sharp division among the circuits.

II. THE OPPOSITION DOES NOT REBUT AMERICAN'S SHOWING THAT, UNDER THE PRECLUSION DOCTRINE APPLIED BY THE EIGHTH AND OTHER CIRCUITS, PRECLUSION WOULD BE APPROPRIATE HERE.

Preclusion is appropriate because of the extremely close relationship between this case and previous cases in which the legality of American's "training seat" policy has already been resolved in American's favor against challenges from pilots or the EEOC on their behalf. For example, the plaintiffs here, as those in *Johnson*,[4] challenge precisely the same "training seat" policy in order to assert identical contractual rights under the very same collective bargaining agreement. Both seek to use the same accrued seniority under the very same collective bargaining agreement to bid for the third seat in the cockpit. The obstacle for both, as for every other challenger to American's "training seat" policy, is that American's requirements for the third seat have been consistently found

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[3] *Tyus*, 93 F.3d at 454.

[4] *Johnson v. American Airlines, Inc.*, 745 F.2d 988 (5th Cir. 1984), *cert. denied*, 472 U.S. 1027 (1985).

to be a *bona fide* occupational qualification.[5]

Indeed, the *Johnson* plaintiffs brought their claim of intentional violation of the ADEA not only for themselves but for "all others similarly situated." *Johnson v. American Airlines, Inc.*, 487 F. Supp. 1343, 1343 (N.D. Tex. 1980).[6] The *Johnson* plaintiffs sought a full range of relief that, if granted, would have eliminated the practice respondents challenge here. The *Johnson* plaintiffs expressly requested that American be enjoined from reserving the third seat as a training seat by enforcing its requirements for that position. If that case had been decided against American, *all* of its pilots, including respondents, would have been able to bid down to the third seat.

Even respondents grudgingly concede that, if American's policy had been found to violate the ADEA, a court providing relief "may . . . have entered a remedial order ultimately benefitting other pilots." Opp. at 9. In fact, it is well settled

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[5] Respondents attempt to confuse the question by arguing that the challenges from those wishing to be hired from the outside for a third seat position are somehow different from challenges by current employees wishing to bid down for a third seat position. The challenges, however, are identical. In each case, the challengers complained that American's policy limiting the third seat position to pilots young enough to progress from it to captain, and to serve as a captain for a reasonable period before reaching the FAA-mandated age limit, violated the ADEA. In each case, American successfully persuaded the trier of fact that the age requirement was a *bona fide* occupational qualification, because the third seat was used as a training position, and therefore could lawfully be denied to those too old to qualify. Thus, American's training seat policy has previously been challenged as an ADEA violation not just once, but regularly since 1977 by an array of plaintiffs.

[6] Respondents here also proceeded for themselves and "all others similarly situated," seeking broad injunctive relief as well as personal remedies.

that the courts of the United States, adjudicating violations of federal employment discrimination statutes, have complete remedial authority and consistently exercise that authority to eliminate employment practices found to be unlawful. *See Bowe v. Colgate Palmolive Co.*, 489 F.2d 896 (7th Cir. 1973) (expressly adopting a judicial policy of providing broad injunctive relief in discrimination cases); *Rosen v. Public Serv. Elec. & Gas Co.*, 477 F.2d 90, 95-96 (3d Cir. 1973) (following *Bowe*'s policy that injunctive relief in discrimination cases "should be broadly read and applied"); *see also Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975) (holding that the district court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar similar discrimination in the future) (citations omitted).

Thus, if the *Johnson* plaintiffs -- or any other challengers to American's training seat policy -- had won their claim, the trial court would have accordingly enjoined American's third seat requirements. There would then have been no basis for the *Tice* plaintiffs to have sued at all, because they would not have been subjected to those requirements.

Respondents' vague argument that there are changed circumstances here is meritless. *See* Opp. at 15. Respondents do not identify any changes in American's third seat policies or practices since any of the earlier plaintiffs failed to demonstrate that its employment requirements violated the ADEA, nor could they. Respondents' further allusion to scientific and medical advances as changed circumstances is simply odd. Such advances might provide a basis for challenging the FAA's mandatory retirement age, but that is not the rule challenged here and not a rule over which American has any control. In any event, no scientific

or medical advances have eliminated the need to train future captains to fly passengers safely.

III. RESPONDENTS DO NOT REBUT AMERICAN'S SHOWING THAT THE PRECLUSIVE EFFECT OF GOVERNMENT ENFORCEMENT ACTIONS IS AN IMPORTANT AND UNRESOLVED ISSUE THAT THIS COURT SHOULD ADDRESS.

This case would be an appropriate vehicle to consider the impact of prior government enforcement actions on subsequent private actions. Respondents do not dispute that the federal government, intervening on behalf of some individuals affected by American's third seat policy, lost that challenge on the merits of its claim that American's policy violated the ADEA. *See Murnane v. American Airlines, Inc.*, 482 F. Supp. 135 (D.D.C. 1979), *aff'd*, 667 F.2d 98 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 915 (1982). Nor do they dispute that the EEOC was found to be collaterally estopped from making a second challenge under the same provisions of the ADEA to that same policy when it attempted to enforce that statute on behalf of *other* individuals affected by American's policy. *See EEOC v. American Airlines, Inc.*, 48 F.3d 164, 169 (5th Cir. 1995). The question presented by this case is whether still other individuals affected by that policy should be free to relitigate that same issue, when the EEOC would *not* be permitted to relitigate the question on their behalf.

Respondents' reliance on the statutory provisions to argue that subsequent private litigation of the same issue is not precluded stretches those provisions beyond recognition and requires results contrary to Congress' express intentions. Sections 216(b), (c) and 626(b), (c) simply empower the implementing federal agency to bring actions on behalf of employees for money damages, to collect those damages and

then to pay them to the employees. The provisions do not address the question of preclusion, directly or indirectly.

The provisions that respondents attempt to rely on do, however, establish a priority between government and private enforcement suits by providing that when an agency does commence a suit on behalf of specific employees, the employees lose their rights to sue on their own behalf. *See* 29 U.S.C. §§ 216(b), (c); 626(b), (c). Congress could, of course, have avoided the burden of duplicate suits by allowing the first filed suit to take precedence, or even more simply, by precluding duplicate remedies. Instead, Congress made clear that the agency is its preferred plaintiff by providing that, regardless of timing, the agency suit always takes precedence, and that when the agency files, the private plaintiff loses not merely a duplicate remedy but the right of action itself.

The result under respondents' reading of these provisions turns Congress' expressly established preference on its head. Under that reading, the agency is estopped from relitigating the same issue in subsequent litigation brought on behalf of different employees, but those different employees are not estopped. Thus, respondents' reading places employees in a better position to enforce the anti-discrimination provisions than the agency, and would result in private employees displacing the agency as the primary enforcement agent, instead of the other way around. That clearly was not Congress' intention, as Congress expressly designated the agency as its preferred plaintiff.[7]

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[7]Indeed, Congress' preference for agency enforcement is further made clear by its empowering the agency to enforce the ADEA in the absence of any employee complaints. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28, (1991) ("the EEOC's role in combating age discrimination is not dependent on the filing of a charge").

The narrow approach to the doctrine of both claim and issue preclusion applied below imposes substantial burdens on judicial resources and on defendants who are repeatedly subjected to the considerable costs of litigation over questions which have been fully aired and determined. As this Court recognized in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971), repetitive litigation is a form of harassment that can achieve through the imposition of litigation costs what it cannot achieve by the application of law. The litigation here, brought by members of the same employment group who are bound by the same employment contract, is exactly the type of repetitive litigation that should be subject to issue or claim preclusion. Under the jurisprudence of several Federal Circuits, such litigation would be precluded. But under the decision below and other Circuits adopting the same view, preclusion is not available. Nothing in the opposition undercuts the importance of resolving this question.

CONCLUSION

For the reasons stated above, this Court should grant American's petition and reverse the decision of the Seventh Circuit.

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